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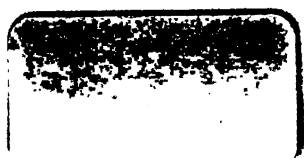
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REPORTS OF CASES

DECIDED IN THE

SUPREME COURT OF APPEALS

25937

OF

VIRGINIA,

BY

GEORGE W. HANSBROUGH.

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JUDGES
OF THE
SUPREME COURT OF APPEALS

DURING THE TIME OF THESE REPORTS.

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BENJAMIN W. LACY,
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ROBERT A. RICHARDSON,
DRURY A. HINTON.

Attorney-General:

R. TAYLOR SCOTT.

State Reporter:

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TABLE OF CASES REPORTED..

	PAGE.
Abshire and Tench, - - - - -	768
Adams and N. & W. R. R. Co., - - - - -	393
Alexander v. Commonwealth, - - - - -	809
Alexandria Ins. Co. and Hardin, - - - - -	413
Allen v. Commonwealth, - - - - -	356
Anderson and N. & W. R. R. Co., - - - - -	1
Arthur and Moorman, - - - - -	455
Aston's Adm'r v. Kendrick & als, - - - - -	825
Bank of Princeton and Higginbotham, - - - - -	233
Bank of Princeton and Ronald, - - - - -	813
Barker v. Commonwealth, - - - - -	820
Barr & al. v. Steagall, - - - - -	73
Barry v. Commonwealth, - - - - -	597
Bassett, <i>ex parte</i> , - - - - -	679
Bates & als. v. George & als., - - - - -	839
Beal v. City of Roanoke, - - - - -	77
Beard's Adm'r v. Chesapeake & Ohio R. R. Co., - - - - -	351
Benton v. Commonwealth, - - - - -	328
Berryville L. & I. Co. and Lewis, - - - - -	693
Beveridge and Gibson, - - - - -	696
Betts v. Waring, - - - - -	46
Blanchard v. State Bank, - - - - -	22
Blackwell v. Landreth, - - - - -	748
Breeden v. Ginter, - - - - -	565
Bright and Western U. Tel. Co., - - - - -	778
Brown v. Chapman, - - - - -	174
Brown and Danville & Western R. R. Co., - - - - -	340
Brown v. Putney & als., - - - - -	447
Brown v. Commonwealth, - - - - -	671
Buford v. North Roanoke L. & I. Co., - - - - -	418
Burroughs v. Taylor, - - - - -	55
Butler & al. v. Moore & al., - - - - -	683

Callahan v. Young, clerk,	-	-	-	574
Chapman and Brown, -	-	-	-	174
Chapman v. Chapman,	-	-	-	409
Chappell v. Trent,	-	-	-	849
Chase v. Miller,	-	-	-	323
Charlottesville P. B. & L. Ass'n and Commonwealth,	-	-	-	790
Chesapeake & Ohio R. R. Co. v. Hafner's Adm'r,	-	-	-	621
Chesapeake & Ohio R. R. Co. and Beard's Adm'r,	-	-	-	351
City of Richmond and Isaacs, Taylor & Williams,	-	-	-	30
City of Roanoke and Beal,	-	-	-	77
City of Bristol and Mumpower,	-	-	-	151
City of Bristol and Echols,	-	-	-	165
Clark v. Commonwealth,	-	-	-	360
Clark and Krise,	-	-	-	711
Clement and Strode,	-	-	-	553
Clinch River Veneer Co. v. Kurth,	-	-	-	737
Coleman v. Commonwealth,	-	-	-	635
Combs v. Commonwealth,	-	-	-	88
Combs and Commonwealth,	-	-	-	88
Commonwealth and Morgan,	-	-	-	80
Commonwealth and Short,	-	-	-	96
Commonwealth v. Tilley,	-	-	-	99
Commonwealth and Taylor,	-	-	-	109
Commonwealth and Welch,	-	-	-	318
Commonwealth and Benton,	-	-	-	328
Commonwealth and Allen,	-	-	-	356
Commonwealth and Clark,	-	-	-	360
Commonwealth and Shifflett,	-	-	-	386
Commonwealth and Phillips,	-	-	-	401
Commonwealth and Forbes,	-	-	-	550
Commonwealth and Whalen,	-	-	-	544
Commonwealth v. McCullough,	-	-	-	597
Commonwealth v. Davis & als.,	-	-	-	597
Commonwealth v. Barry,	-	-	-	597
Commonwealth v. McCullough & Co.,	-	-	-	597
Commonwealth and Coleman,	-	-	-	635
Commonwealth v. Brown,	-	-	-	671
Commonwealth and Myers,	-	-	-	705
Commonwealth and Smith,	-	-	-	759
Commonwealth and Myers,	-	-	-	785
Commonwealth and Alexander,	-	-	-	809
Commonwealth and Barker,	-	-	-	876
Commonwealth and Lewis,	-	-	-	820
Commonwealth v. Charlottesville P. B. & L. Ass'n,	-	-	-	790
Commonwealth and Read,	-	-	-	168

Commercial Bank and Ruffin,	-	-	-	-	708
Compton v. Thorn,	-	-	-	-	653
Craig v. Williams,	-	-	-	-	500
Crocket and Moorman,	-	-	-	-	185
Crocket and Sayers,	-	-	-	-	185
Crozer Iron Co. and Va. Development Co.,	-	-	-	-	126
Cussin and Taylor,	-	-	-	-	40
Danville & Western R. R. Co. v. Brown,	-	-	-	-	340
Daniel's Ex'or v. Wharton,	-	-	-	-	584
Daniel v. McKinney,	-	-	-	-	702
Davis and Commonwealth,	-	-	-	-	597
Deaton v. Taylor,	-	-	-	-	219
DeButts and R. & D. R. R. Co.,	-	-	-	-	405
Dickey and Wood,	-	-	-	-	160
Dillon and Morton,	-	-	-	-	592
Dowell and Shiftlett,	-	-	-	-	745
Draper and N. & W. R. R. Co.,	-	-	-	-	245
Dudley and R. & D. R. R. Co.,	-	-	-	-	304
Echols v. City of Bristol,	-	-	-	-	165
Elkins and Richlands Iron Co.,	-	-	-	-	249
Ellison and Simon,	-	-	-	-	157
Etter v. Scott,	-	-	-	-	762
Exchange & B. Co. v. Roanoke G. & W. Co.,	-	-	-	-	83
Ex parte Bassitt,	-	-	-	-	679
Farinholt v. Luckhard,	-	-	-	-	936
Finks and Gaskins,	-	-	-	-	384
Forbes v. Commonwealth,	-	-	-	-	550
Funk and Machir,	-	-	-	-	284
Gaskins v. Finks,	-	-	-	-	384
Georgia H. & Ins. Co. v. Thomas,	-	-	-	-	658
George & als v. Bates & als,	-	-	-	-	839
Gibson v. Beveridge,	-	-	-	-	696
Ginter v. Breeden,	-	-	-	-	565
Grattan and Hotchkiss,	-	-	-	-	642
Grant v Sutton,	-	-	-	-	771
Green and Moore,	-	-	-	-	181
Grinberg & Morris v. Singerman,	-	-	-	-	645
Gross and Woodrum,	-	-	-	-	60
Grubb & als. v. Starkey & als.,	-	-	-	-	831
Hale v. Hale,	-	-	-	-	728
Hale and Hale,	-	-	-	-	728

Haffner's Adm'r and Ches. & O. R. R. Co.,	-	-	-	621
Harden v. Alex. Ins. Co.,	-	-	-	413
Haupt and Va. Land Co.,	-	-	-	533
Heckert v. Hile's Adm'r,	-	-	-	390
Heninger v. Heninger,	-	-	-	271
Heninger and Heninger,	-	-	-	271
Higginbotham v. Bank of Princeton,	-	-	-	233
Higginbotham v. May & al.,	-	-	-	233
Hill v. Postley,	-	-	-	200
Hile and Heckert,	-	-	-	390
Hogan v. Tyler, Receiver,	-	-	-	19
Hotchkiss v. Grattan, Judge,	-	-	-	642
Housman and Swann,	-	-	-	816
Humphreys and Richmond & Meck. R. R. Co.,	-	-	-	425
Hunter v. McCullough,	-	-	-	699
Isaacs, Taylor & Williams v. City of Richmond,	-	-	-	30
Johnson v. Norton L. & I. Co.,	-	-	-	267
Johnson and Richmond City & S. P. R. R. Co.,	-	-	-	775
Kendrick v. Spotts & Gibson,	-	-	-	148
Kendrick & als. and Aston's Adm'r,	-	-	-	825
King v. King,	-	-	-	177
King and King,	-	-	-	177
King v. Lynn, Superintendent Penitentiary,	-	-	-	345
King v. Norfolk and Western R. R. Co.,	-	-	-	210
Kinsey v. Kinsey,	-	-	-	16
Krise v. Ryan,	-	-	-	711
Krise v. Clark,	-	-	-	711
Kurth and Clinch River Veneer Co.,	-	-	-	737
Lake v. Tyree,	-	-	-	719
Landreth v. Blackwell,	-	-	-	748
Lewis v. Commonwealth,	-	-	-	843
Lewis v. Berryville L. & I. Co.,	-	-	-	693
Lewis and Walker,	-	-	-	578
Lipscombe and Saunders,	-	-	-	647
Lipscombe and N. & W. R. R. Co.,	-	-	-	137
Logan v. Pannill,	-	-	-	11
Luckhard and Farinholt,	-	-	-	936
Lynn, Superintendent Penitentiary, and King,	-	-	-	345
Machir v. Funk,	-	-	-	284
Magarity v. Succop's Adm'r,	-	-	-	561

Mallory v. Taylor, - - -	348
Marshall's Adm'r v. N. & W. R. R. Co., - - -	836
Massey v. Yancey, - - -	626
May and Higginbotham, - - -	233
McCormick and Stevens, - - -	735
McCullough & Co. and Commonwealth, - - -	597
McCullough and Commonwealth, - - -	597
McCullough v. Hunter, - - -	699
McGavock's Adm'r and N. & W. R. R. Co., - - -	507
McKinney v. Daniel, - - -	702
Michael v. Roanoke Machine Works, - - -	492
Milburn Wagon Co. v. Nisewanger, - - -	714
Miller and Chase, - - -	323
Mills & Fairfax v. N. & W. R. R. Co., - - -	523
Moore v. Butler, - - -	683
Moore v. Green, - - -	181
Moorman v. Crockett, - - -	185
Moorman v. Arthur, - - -	455
Moorman v. Town of Danville, - - -	455
Morgan v. Commonwealth, - - -	80
Morgan and Fire & Marine Ins. Co., - - -	290
Morotock Ins. Co. v. Thomas, - - -	658
Morris v. Virginia State Ins. Co., - - -	370
Morton v. Dillon, - - -	592
Mullin and Wirtz, - - -	805
Mumpower v. City of Bristol, - - -	151
Myers v. Commonwealth, - - -	785
Myers v. Commonwealth, - - -	705
Newberry and Rison, - - -	513
Nisewarner and Milburn Wagon Co., - - -	714
N. & W. R. R. Co. v. Anderson, - - -	1
N. & W. R. R. Co. v. Lipscombe, - - -	137
N. & W. R. R. Co. v. Rasnake, - - -	170
N. & W. R. R. Co. v. Thomas, - - -	205
N. & W. R. R. Co. and King, - - -	210
N. & W. R. R. Co. and Scott, - - -	241
N. & W. R. R. Co. v. Draper, - - -	245
N. & W. R. R. Co. v. Wilson, - - -	263
N. & W. R. R. Co. v. Adams, - - -	393
N. & W. R. R. Co. v. McGavock's adm'rs, - - -	507
N. & W. R. R. Co. and Mills and Fairfax, - - -	523
N. & W. R. R. Co. v. Phelps, - - -	665
N. & W. R. R. Co. v. Ward, - - -	687
N. & W. R. R. Co. v. Marshall's Adm'r, - - -	836

North Roanoke L. & I. Co. and Buford,	-	-	-	418
Norton L. & I. Co. and Johnson,	-	-	-	267
Offield and White,	-	-	-	336
Osburn v. Throckmorton,	-	-	-	311
Pannill and Logan,	-	-	-	11
Peebles v. Watts' Heirs,	-	-	-	57
Phelps and N. & W. R. R. Co.	-	-	-	665
Phillips v. Commonwealth,	-	-	-	401
Postly and Hill,	-	-	-	200
Putney and Brown,	-	-	-	447
Raby & als. v. Voight,	-	-	-	799
Rasnake and N. & W. R. R. Co.,	-	-	-	170
Reed v. Commonwealth,	-	-	-	198
Richland Iron Co. v. Elkins,	-	-	-	249
R. & D. R. R. Co. v. Dudley,	-	-	-	304
R. & D. R. R. Co. v. De Butts,	-	-	-	405
Richmond & Meck. R. R. Co. v. Humphreys,	-	-	-	425
Richmond & Seven Pines R. R. Co. v. Johnson,	-	-	-	775
Richmond Ice Machine Co. and Weisger,	-	-	-	795
R. & D. R. R. Co. v. Yeaman,	-	-	-	752
Rison v. Newberry,	-	-	-	513
Roanoke Gas & W. Co. and Exchange & B. Co.,	-	-	-	83
Roanoke Machine Works and Michael,	-	-	-	492
Ronald v. Bank of Princeton,	-	-	-	813
Ruffin v. Commercial Bank,	-	-	-	708
Ryan and Krise,	-	-	-	711
Saunders v. Smith,	-	-	-	57
Saunders v. Lipscombe,	-	-	-	647
Sayers v. Sayers,	-	-	-	755
Sayers and Sayers,	-	-	-	755
Sayers v. Crockett,	-	-	-	185
Scott v. N. & W. R. R. Co.,	-	-	-	241
Scott v. Etter,	-	-	-	762
Shifflett v. Commonwealth,	-	-	-	386
Shifflett v. Dowell,	-	-	-	745
Short v. Commonwealth,	-	-	-	96
Singerman and Grinberg & Morris,	-	-	-	645
Sims and Whitelaw,	-	-	-	588
Simon v. Ellison & als.,	-	-	-	157
Sites and Tyler, Receiver,	-	-	-	539

Slater v. Slater,	-	-	-	-	-	845
Slater and Slater,	-	-	-	-	-	845
Smith and Saunders,	-	-	-	-	-	57
Smith v. Commonwealth,	-	-	-	-	-	759
Smythe v. Smythe,	-	-	-	-	-	638
Smythe and Smythe,	-	-	-	-	-	638
Spotts & Gibson and Kendrick,	-	-	-	-	-	148
Starkey v. Grubb,	-	-	-	-	-	831
State Bank of Va. v. Blanchard,	-	-	-	-	-	22
Steagall and Barr,	-	-	-	-	-	73
Steagall v. Steagall,	-	-	-	-	-	73
Steagall and Steagall,	-	-	-	-	-	73
Stevens v. McCormick,	-	-	-	-	-	735
Strode v. Clement,	-	-	-	-	-	553
Succop's adm'r and Magarity,	-	-	-	-	-	561
Sutton and Grant,	-	-	-	-	-	771
Swann v. Housman,	-	-	-	-	-	816
Taylor v. Cussen,	-	-	-	-	-	40
Taylor and Burroughs,	-	-	-	-	-	55
Taylor v. Commonwealth,	-	-	-	-	-	109
Taylor and Deaton,	-	-	-	-	-	219
Taylor and Mallory,	-	-	-	-	-	348
Teiger and Wytheville Ins. & B. Co.,	-	-	-	-	-	277
Tench v. Abshire,	-	-	-	-	-	768
Thomas v. Commonwealth,	-	-	-	-	-	92
Thomas and Commonwealth,	-	-	-	-	-	92
Thomas and Morotock Ins. Co.,	-	-	-	-	-	658
Thomas and N. & W. R. R. Co.,	-	-	-	-	-	205
Thomas and Va. Fire & M. Ins. Co.,	-	-	-	-	-	658
Thomas and Georgia Ins. Co.,	-	-	-	-	-	658
Thomas and Western Ass. Co.,	-	-	-	-	-	658
Throckmorton and Osburn,	-	-	-	-	-	311
Thorn and Compton,	-	-	-	-	-	653
Tilley v. Commonwealth,	-	-	-	-	-	99
Town of Danville and Moorman,	-	-	-	-	-	455
Trinkle and Wohlford,	-	-	-	-	-	227
Tyler and Hogan,	-	-	-	-	-	19
Tyler and Western U. Tel. Co.,	-	-	-	-	-	297
Tyler, Receiver, v. Sites,	-	-	-	-	-	539
Tyree and Lake,	-	-	-	-	-	719
Trent and Chappell,	-	-	-	-	-	849
Va. Development Co. v. Crozer Iron Co.,	-	-	-	-	-	126
Va. Fire & M. Ins. Co. v. Morgan,	-	-	-	-	-	290

Va. State Ins. Co. and Morris,	-	-	-	-	370
Virginia Land Co. v. Haupt,	-	-	-	-	533
Va. Fire & M. Ins. Co. v. Thomas,	-	-	-	-	658
Voight v. Raby & als.,	-	-	-	-	799
Walker v. Lewis,	-	-	-	-	578
Ward and N. & W. R. R. Co.,	-	-	-	-	687
Waring v. Betts,	-	-	-	-	46
Watts and Peebles,	-	-	-	-	57
Welch v. Commonwealth,	-	-	-	-	318
Weisiger v. Richmond Ice Machine Co.,	-	-	-	-	795
Western Ins. Co. v. Thomas,	-	-	-	-	658
Western U. Tel. Co. v. Bright,	-	-	-	-	778
Western U. Tel. Co. v. Tyler,	-	-	-	-	297
Whalen v. Commonwealth,	-	-	-	-	544
Wharton and Daniel's ex'or,	-	-	-	-	584
Whitelaw v. Sims,	-	-	-	-	588
White v. Offield,	-	-	-	-	336
Williams and Craig,	-	-	-	-	500
Wilson and N. & W. R. R. Co.,	-	-	-	-	263
Witz, Biedler & Co. v. Mullin,	-	-	-	-	805
Wood v. Dickey,	-	-	-	-	160
Woodrum v. Gross,	-	-	-	-	60
Wohlford v. Trinkle,	-	-	-	-	227
Wytheville Ins. & B. Co. v. Teiger,	-	-	-	-	277
Yancey and Massey,	-	-	-	-	626
Yeamans and R. & D. R. R. Co.,	-	-	-	-	752
Young and Callahan,	-	-	-	-	574

TABLE OF CASES CITED IN OPINIONS.

	PAGE.
Adams' Case, 23 Gratt., 949, - - -	546
Agar v. Fairfax, 17 Ves., 533, - - -	735
Allen v. Hart, 18 Gratt., 722, 734, - - -	777
A. & D. R. R. Co. v. Pecke, 87 Va., 130, 140, 184, - - -	433
Anderson's Case, 18 Gratt., 295, - - -	132
Anderson v. Burwell, 6 Gratt., 445, - - -	197
Anderson v. Tompkins, 1 Brock., 456, - - -	202
Andrew v. Fontaine, 2 Stockton Ch., 91, - - -	428
Antoni v. Wright, 22 Gratt., 813, - - -	607
Archer's Case, 10 Gratt., 627, - - -	358
Armstead v. Bailey, 83 Va., 244, - - -	231
Armentrout v. Gibson, 25 Gratt., 375, - - -	158
Armstrong v. People, 70 N. Y., 38, - - -	824
Atlas Engine Works v. Randall, 100 Ind., 293, - - -	497
Bailey v. Bailey, 21 Gratt., 43, - - -	274
Bales v. Perry, 51 Mo., 449, - - -	44
B. & O. R. R. Co. v. McKenzie, 80 Va., 449, - - -	496, 497
Bang v. Farmville Ins. Co., 1 Hughes, 290, - - -	287
Bank v. Carrington, 7 Leigh, 581, - - -	74
Bank v. Lee, 13 Pet., 107, - - -	506
Barbier v. Connolly, 113 U. S., 27, - - -	129
Barclay v. Campbell, 2 Comp., 527, - - -	53
Barnett v. Barnett, 83 Va., 504, 510, - - -	798
Barry v. Edmunds, 116 U. S., 550, - - -	9
Bayley v. Merrill, Cro. Jac., 386, - - -	723
Beale v. Williamson, 14 Ala., 55, - - -	506
Bean v. Simmons, 9 Gratt., 371, - - -	423
Bean v. Smith, 2 Mason, 252, - - -	28
Beecher v. Wilson, 84 Va., 813, - - -	316
Benn v. Hatcher, 81 Va., 25, 33, - - -	247
Benton's Case, 89 Va., 570, - - -	552

Bertha Zinc Co. v. Beach, 88 Va., 303,	-	-	-	9
Blake v. Hawkins, 98 U. S., 315,	-	-	-	287
Bland & Jiles Ct. Judge Case, 33 Gratt., 447,	-	-	-	321, 403
Blow v. Maynard, 2 Leigh, 29,	-	-	-	632
Bocher v. Williamsburg Ins. Co, 35 N. Y., 131,	-	-	-	280
Bolanze et als. v. Commonwealth, 24 Gratt., 31,	-	-	-	358
Bolling v. Mayor of Petersburg, 3 Rand., 563, 576,	-	-	-	43
Bond's Case, 80 Va., 581,	-	-	-	637
Boon v. Simmons, 88 Va., 259,	-	-	-	701
Boom Co. v. Patterson, 98 U. S. R., 403,	-	-	-	436, 445
Borland v. Barrett, 76 Va., 128,	-	-	-	7, 9, 146
Bosher v. R. & H. Land Co., 89 Va., 455,	-	-	-	537, 797
Bostford v. Burr, 2 John. Chy. R., 405,	-	-	-	489
Bowers v. Bowers, 29 Gratt., 697,	-	-	-	564, 685
Bowzer v. Chestnut, 4 Leigh, 1,	-	-	-	268
Boyce v. People, 55 N. Y., 644,	-	-	-	822
Boyd v. Oglesby, 23 Gratt., 674,	-	-	-	586
Brant v. Va. Coal & Iron Co., 93 U. S., 326,	-	-	-	44
Brent v. Washington, 18 Gratt., 526,	-	-	-	410
Brig Burora v. U. S., 7 Cranch, 382,	-	-	-	682
Brimmer v. Redman, 138 U. S., 78,	-	-	-	32
Bristow's Case, 15 Gratt., 634,	-	-	-	369
Brockenbrough v. Brockenbrough, 31 Gratt., 599,	-	-	-	650
Brooks v. Marburry, 11 Wheat, 78, 90,	-	-	-	29
Brown v. Butler, 87 Va., 626,	-	-	-	339
Brown's Case, 86 Va., 466, 476,	-	-	-	369
Bruce v. Slemp, &c., 82 Va., 352,	-	-	-	243
Bryan v. Stump, 8 Gratt., 247,	-	-	-	374
Buffalo v. Town of Pocahontas, 85 Va., 222, 225,	-	-	-	807
Buffington v. Harvey, 95 U. S., 99,	-	-	-	25
Bull v. Read, 13 Gratt., 78,	-	-	-	682
Burch's Ex'or v. Fluvanna County, 86 Va., 452,	-	-	-	38
Byrd v. Commonwealth, 2 Va., 496; 2 Rob., 214,	-	-	-	760
Byrne v. N. Y. Central, &c., R. R. Co., 104 N. Y., 362,	-	-	-	265
Campbell v. Rust, 85 Va., 653,	-	-	-	806, 834
Campbell v. Bowler, 30 Gratt., 652,	-	-	-	772
Campbell v. Arkenbright, 3 H. & M., 144-197,	-	-	-	732
Campbell v. Campbell, 21 Gratt., 649,	-	-	-	713
Campbell v. Campbell, 22 Gratt., 666,	-	-	-	316, 339
Carpenter v. Hillister, 13 L. M. T., 552 (37 Amer. Dic., 612),	-	-	-	491
Carpenter v. Dexter, 75 U. S., 8 Wall., 426-429,	-	-	-	744
Carter v. Hough, Gray & Co., 89 Va., 503,	-	-	-	713
Carter v. Allen, 21 Gratt., 241,	-	-	-	28, 485
Cayuga County Bank v. Hune, 2 Hill, 635,	-	-	-	53

CASES CITED.

XV

<i>Chaffin v. Lynch</i> , 83 Va., 106,	-	-	-	557
<i>Chaffee v. U. S.</i> , 18 Wall., 516,	-	-	-	780
<i>Chapman v. M. R. & C. R. R. Co.</i> , 6 Ohio St., 119,	-	-	-	835
<i>Chater v. Becket</i> , 7 Tenn., 197,	-	-	-	616
<i>Cheatwood v. Mayo</i> , 5 Munf., 16,	-	-	-	749
<i>Chesapeake & Ohio Ry. Co. v. Lee</i> , 84 Va., 642,	-	-	-	408
<i>Cheatham v. Cheatham, &c.</i> , 81 Va., 395-403,	-	-	-	164
<i>Chicago, M. & St. Paul R. R. Co. v. Pioneer Fuel Co., Beach R. R. Law</i> , sec. 924,	-	-	-	396
<i>Chilhowie Iron Co. v. Gardner</i> , 79 Va., 305-311,	-	-	-	164, 519
<i>Chowning v. Cox</i> , 1 Rand. (Va.), 311,	-	-	-	373
<i>Christian & Gunn v. Keene</i> , 80 Va., 369,	-	-	-	42
<i>City of Lynchburg v. Slaughter</i> , 75 Va., 57,	-	-	-	35
<i>City of Richmond v. Supervisors of Henrico County</i> , 83 Va., 204,	-	-	-	788
<i>Clark v. Long</i> , 4 Rand., 452,	-	-	-	158
<i>Clark, Adm'r, v. R. & D. R. R. Co.</i> , 78 Va., 909,	-	-	-	624, 354
<i>Clark v. R. & D. R. R. Co.</i> , 96 Va., 717,	-	-	-	408
<i>Clark v. Molyneux</i> , 3 Q. B. Div., 237,	-	-	-	559
<i>Clark v. Tyler</i> , 30 Gratt., 134,	-	-	-	609
<i>Clark v. Krize</i> , 89 Va., 739,	-	-	-	712
<i>Clark v. Chamberlain</i> , 112 Mass., 19,	-	-	-	842
<i>Clark v. Fisher</i> , 1 Paige, 171,	-	-	-	860, 933
<i>Clay v. Ballard</i> , 87 Va., 787,	-	-	-	643
<i>Clay v. Walters</i> , 79 Va., 92,	-	-	-	684
<i>Cobb v. Fountain</i> , 3 Rand., 484,	-	-	-	758
<i>Cock v. Lullis</i> , 18 Wall., 342,	-	-	-	477
<i>Cocke v. Minor</i> , 25 Gratt., 260,	-	-	-	502
<i>Coffman v. Bruffy</i> , 26 Gratt., 698,	-	-	-	239
<i>Cole v. Miller</i> , 8 Gratt., 413,	-	-	-	744
<i>Cole v. Cole</i> , 79 Va., 251,	-	-	-	640
<i>Cole v. McRea</i> , 6 Rand., 644,	-	-	-	736
<i>Collins v. Lofton & Co.</i> , 10 Leigh, 5,	-	-	-	158
<i>Colston v. McKay</i> , 1 Marsh., 251,	-	-	-	704
<i>Commonwealth v. Head</i> , 11 Gratt., 819,	-	-	-	81
<i>Commonwealth v. Bull</i> , 14 Gratt., 628,	-	-	-	117
<i>Commonwealth v. Ricks</i> , 1 Gratt., 416,	-	-	-	159
<i>Commonwealth v. Knapp</i> , 9 Pich., 515,	-	-	-	721, 403
<i>Commonwealth v. Ross</i> , 6 Serge & Rawle, 427,	-	-	-	559
<i>Commonwealth v. Teevens</i> , 143 Mass., 211,	-	-	-	359
<i>Commonwealth v. McPike</i> , 3 Cush., 181,	-	-	-	363
<i>Commonwealth v. Hackett</i> , 2 Allen, Mass., 136,	-	-	-	364
<i>Commonwealth v. Green</i> , 1 Ashm., 289,	-	-	-	364
<i>Commonwealth v. Brettum</i> , 100 Mass., 206,	-	-	-	546
<i>Condon v. Southside R. R. Co.</i> , 14 Gratt., 302,	-	-	-	530
<i>Converse v. Converse</i> , 21 Verm. R., 168,	-	-	-	859

Cook v. Wallace, 18 Wall., 341,	-	-	-	477
Cooley v. Board of Port Wardens, 12 How., 299,	-	-	-	299
Cooper v. Hepburn, 15 Gratt., 551, 559,	-	-	-	582
Cornett v. Rheedy, 80 Va., 714,	-	-	-	153
Cottrill's Case, 83 Va., 512,	-	-	-	625
Craig v. Williams, 90 Va., 500,	-	-	-	646
Craig v. State of Missouri, 4 Peters, 436,	-	-	-	617
Cralle v. Cralle, 84 Va., 198,	-	-	-	44, 274
Crawford v. Murrel, 8 John., 253,	-	-	-	616
Creighton v. Kerr, 20 Wall., 8,	-	-	-	183
Crenshaw v. Seigfried, 24 Gratt., 272,	-	-	-	377
Cropp v. Cropp, 88 Va., 753,	-	-	-	542
Crump v. U. S. Mining Co., 7 Gratt., 352,	-	-	-	537
Cunningham v. Mitchell, 4 Rand., 189,	-	-	-	268
Curtis v. Rochester & S. R. R. Co., 18 N. Y., 534,	-	-	-	837
Daingerfield v. Thompson, 33 Gratt., 136,	-	-	-	261
Dale v. Hamilton, 5 Hare, 381,	-	-	-	734
Daley's Ex'or v. Walden, &c., 80 Va., 572,	-	-	-	571
Danville Bank v. Waddill, 31 Gratt., 469, 477,	-	-	-	10
Darracott's Case, 83 Va., 294,	-	-	-	625
Davis v. Commonwealth, 16 Gratt., 134,	-	-	-	176
Davis v. Alvord, 94 U. S., 545,	-	-	-	135
Davis v. State, Vol. 17 S. E. Rep., 292,	-	-	-	117
Day v. Woodworth, 13 How., 363,	-	-	-	8
De Beerski v. Paige, 36 N. Y. Rep., 537,	-	-	-	616
De Farges v. Ryland, 87 Va., 404,	-	-	-	632
Deford v. Hayes, 6 Munf., 390,	-	-	-	321, 403
Delaney v. Goddin, 12 Gratt., 266,	-	-	-	701
Dennard & Alexander v. State of Ga., 2 Ga. Rep., 138,	-	-	-	359
Denver, &c., R. R. v. Harris, 122 U. S., 597,	-	-	-	9
Derr v. Jackson, 2 Southard's Rep., 454,	-	-	-	859
Devries v. Johnston, 27 Gratt., 808,	-	-	-	502
Dickens v. Barnes, 79 N. C., 490,	-	-	-	841
Diggs v. Dunn, 1 Munf., 56,	-	-	-	652
Dillard v. Collins, 25 Gratt., 345,	-	-	-	749
Dinsmore v. Lyle, 87 Va., 391,	-	-	-	520
Directors, &c. v. Kisch L. R. 2 H. L. App. Cases, 99,	-	-	-	537
Doe v. Thorley, 10 East, 438,	-	-	-	385
Donnelly v. N. & W. R. R. Co., 84 Va., 858,	-	-	-	306
Dooley v. Baynes, 86 Va., 644,	-	-	-	486
Dougherty v. Commonwealth, 69 Pa. St., 286,	-	-	-	787
Dunbar, &c. v. Todd, 6 Johns., 257,	-	-	-	704
Duncan v. Missouri, 152 U. S., 377,	-	-	-	788
Duranty's Case, 26 Beavan, 268,	-	-	-	695

CASES CITED.

xvii

Duval v. Myers, 2 Maryland Chan., 401,	-	-	-	164
Dyer v. Dyer, Leading Cases, 335-338,	-	-	-	477
Early's Case, 86 Va., 921,	-	-	-	801
East v. Garrett, 84 Va., 523,	-	-	-	411
Edichal Bullion Co. v. Columbia Gold Mining Co., 87 Va., 641,	-	-	-	146
Effinger v. Kenney, 79 Va., 551,	-	-	-	713, 766
Elliott v. Frickburg R. R. Co., 10 Cush., 198,	-	-	-	155
Elys v. Wayne, 22 Gratt., 224,	-	-	-	288
Enger v. Dawley, 62 Vt., 164; S. C. 19 Atc. Rep., 478,	-	-	-	717
Eubank v. Balls, 4 Leigh, 330,	-	-	-	652
Eubank v. Scott, 77 Va., 206,	-	-	-	222
Evans v. Spurgin, 6 Gratt., 118,	-	-	-	488
Ewarts v. Sanders, 25 Gratt., 203,	-	-	-	766
Farnsworth v. Allen, 4 Gray, 453,	-	-	-	53
Fall River Union Bank v. Willard, 5 Metcalf, 216,	-	-	-	51
Farish v. Reigle, 11 Gratt., 697,	-	-	-	9
Farnum v. Phoenix Ins. Co., 83 Cal., 246,	-	-	-	280, 282
Farrington v. Tennessee, 95 U. S., 679,	-	-	-	792
Ferguson's Adm'r v. Teel, 82 Va., 690, 697,	-	-	-	183, 231
Ferguson's Adm'r v. Wills, 88 Va., 136,	-	-	-	281
Ferry v. Clark, 77 Va., 397,	-	-	-	519
Fidelity Trust Co. v. Shenandoah Valley R. R. Co., 86 Va., 1,	-	-	-	132
Field v. Commonwealth, 89 Va., 690,	-	-	-	247
Filley v. Duncan, 93 Amer. Dec., 337,	-	-	-	15
Filson's Trustee v. Himes, 5 Pr. St., 452,	-	-	-	617
Findlay v. Trigg, 83 Va., 543,	-	-	-	316
First National Bank v. Trumbull, 32 Gratt., 695,	-	-	-	744
Fisher v. Vanmeter, 9 Leigh, 18,	-	-	-	560
Fitzgibbon v. Barry, 78 Va., 263,	-	-	-	159
Flagstaff Silver Mining Co. v. Cullings, 104 U. S., 176,	-	-	-	135
Fleming v. Dunlop, 4 Leigh, 338,	-	-	-	339
Ford v. Euker, 86 Va., 75,	-	-	-	164
Frank & Adler v. Lilienfield, 33 Gratt., 377-399,	-	-	-	43
Freeman v. Eacho, 79 Va., 43,	-	-	-	385
Frome v. Dawson, 14 Ves. 387,	-	-	-	732
Fry v. Leslie, 87 Va., 275,	-	-	-	269, 362
Fuller v. Chicopee Manufacturing Co., 16 Gray,	-	-	-	155
Gage v. Crockett, 27 Gratt., 735,	-	-	-	502
Gaines' Case, 86 Va., 682,	-	-	-	365
Galveston & Co. R. R. Co. v. Henry & Dilley, 27 Amer. Eng. R. R. Cases, 265,	-	-	-	530
Garland v. Marx, 4 Leigh, 345,	-	-	-	652
Garnett's Ex'or v. Macon, 6 Call., 343,	-	-	-	586

Gedge v. Matson, 25 Bear., 310,	-	-	-	596
Geiger v. Blackley, 86 Va., 328,	-	-	-	43
Georgie Home Ins. Co. v. Kinnier, 28 Gratt., 88,	-	-	-	282, 664
George's Case, 88 Va., 223,	-	-	-	310
Gerst v. Jones, 32 Gratt., 528,	-	-	-	423
Gibbons v. Ogden, 9 Wheat, 1,	-	-	-	299, 937
Gibson v. Jones, 5 Leigh, 370,	-	-	-	375
Gilliland v. Woodruff, 1 Cowen, 276,	-	-	-	704
Gillespie v. St. L. R. R. Co., &c., 6 Mo. App., 554,	-	-	-	837
Glasgow v. State of Kansas, 21 Pacific Rep., 253,	-	-	-	359
Glass v. Hulbert, 102 Mass., 34,	-	-	-	734
Gloucester Ferry Co. v. Pennsylvania, 114 U. S., 196,	-	-	-	299
Goodman v. R. & D. R. R. Co., 81 Va., 586,	-	-	-	355
Goolsby v. St. John, 25 Gratt., 146,	-	-	-	176
Gordon v. Cannon, 18 Gratt., 387,	-	-	-	202
Gould v. Mansfield, 103 Mass., 408,	-	-	-	732
Grafton v. Cummings, 99 U. S., 100,	-	-	-	731
Grand Trunk R. R. v. Cummings, 106 U. S., 700,	-	-	-	209
Gravely v. Commonwealth, 86 Va., 402-396,	-	-	90, 91,	365
Graybill v. Brough, 89 Va., 805,	-	-	164,	520
Green v. Claiborne, 83 Va., 386,	-	-	-	42
Green's Adm'r v. Thompson, &c., 84 Va., 411,	-	-	-	475
Green & Suttle v. Massie, 21 Gratt., 356,	-	-	-	807
Green v. West Chesire R. R. Co., L. R., 13 Eq., 44,	-	-	-	834
Greenhow, Treasurer, v. Vashon, 81 Va., 350,	-	-	-	609
Greenhow v. James' Ex'or, 80 Va., 636,	-	-	-	391
Gresham v. Ewell, 85 Va., 1,	-	-	-	91
Grey v. Tubbs, 43 Cal., 359,	-	-	-	521
Grim v. Byrd, 32 Gratt., 293,	-	-	-	723
Grizzle v. Southerland, 88 Va., 584,	-	-	-	520
Gunter v. Halsey, Amb., 586,	-	-	-	732
Gwatkins v. Commonwealth, 10 Leigh, 687,	-	-	321,	403
Haldame v. Harvey, 4 Burr, 2484,	-	-	-	803
Hall v. Smith, 25 Gratt., 70,	-	-	-	581
Hall's Case, 80 Va., 555,	-	-	-	789
Hall's Case, 80 Va., 891, 171,	-	-	-	332, 676
Hall's Case, 89 Va., 171,	-	-	-	332, 676
Hampton v. Phipps, 2 Sup. Ct., 612-624,	-	-	-	595
Hanawer v. Doane, 12 Wall., 342,	-	-	-	33
Harman v. City of Lynchburg, 33 Gratt., 37,	-	-	-	150
Hansbrough's Ex'or v. Thom, 3 Leigh, 147,	-	-	-	206
Hansford v. Elliott, 9 Leigh, 348,	-	-	-	410
Hardy v. Nor. Mfg. Co., 80 Va., 404,	-	-	-	744
Harman v. Howe, 27 Gratt., 676,	-	-	321,	403

Harris v. Harris, 31 Gratt., 13,	-	-	-	274, 321
Harris v. Harris, 2 Leigh, 584,	-	-	-	403
Harris v. Harris, 6 Munf., 368,	-	-	-	375
Hartman v. Strickler, 82 Va., 238,	-	-	-	590
Hartman v. Greenhow, 102 U. S., 672,	-	-	-	611
Harwood v. Baker, 3 Moore, C. C., 282-290,	-	-	-	858
Harvey v. Steptoe, 17 Gratt, 289,	-	-	-	373
Haskins v. Agricultural Ins. Co., 78 Va., 700,	-	-	-	519
Haslin v. King, 9 Gratt., 119; 6 Gratt., 815-822,	-	-	-	744
Hausenfluck's Case, 85 Va., 702,	-	-	-	824
Hankins v. Gresham, 85 Va., 34,	-	-	-	150
Hawley v. Twyman, 24 Gratt., 518,	-	-	-	747
Henderson v. Mayor, &c., 92 U. S., 559,	-	-	-	299
Herring v. Wickham, 29 Gratt., 628,	-	-	-	684
Herron & Holland v. Dibbrell Bros., 84 Va., 289,	-	-	-	717
Hewitt's Case, 17 Gratt., 629,	-	-	-	320, 321, 402
Hey's Case, 82 Va., 946,	-	-	-	675
Higginbotham v. Chamberlayne, 4 Munf., 547,	-	-	-	321, 402
High v. R. R. Co., 112 N. C., 385,	-	-	-	540
Hill's Case, 2 Gratt., 594,	-	-	-	676
Hill v. Bush, 19 Ark., 522,	-	-	-	725
Hill v. Epley, 31 Pa. St., 331,	-	-	-	44
Hill v. Woodward, 78 Va., 765,	-	-	-	183, 231
Hitchcox v. Rawson, 14 Gratt., 526,	-	-	-	289
Hogan v. Guigon, Judge, 29 Gratt.,	-	-	-	56
Hogan v. Providence & Worcester R. R., 3 R. I., 88, 89,	-	-	-	146
Hogan's Adm'r v. Tyler, Receiver, 17 S. E. Rep., 723,	-	-	-	266
Honesty's Case, 78 Va., 283, 298,	-	-	-	369
Hood v. Haden, 82 Va., 588,	-	-	-	287, 385
Hooker's Case, 13 Gratt., 763,	-	-	-	637
Hook v. Nanny, 4 H. & M., 157,	-	-	-	321, 403
Hoover v. Calhoun, 16 Gratt., 112,	-	-	-	164
Hord's Adm'r v. Colbert, 28 Gratt., 49,	-	-	-	203
Hornthall v. Burrell, N. C., 13 S. E. R., 721,	-	-	-	506
Horton v. Bond, 28 Gratt., 815, 822,	-	-	-	736
Hough v. R. R. Co., 100 U. S., 213,	-	-	-	496
Howard v. McCall, 21 Gratt., 205,	-	-	-	117
Hubbard v. Andrews, 76 Ga., 177,	-	-	-	506
Hubble v. Coles, 85 Va., 504,	-	-	-	243
Hucless v. Childrey, 135 U. S., 709,	-	-	-	602, 606
Hughes v. Tinsley & Bro., 80 Va., 259,	-	-	-	243
Hughes v. Caldwell, 11 Leigh, 348,	-	-	-	375
Humphrey v. Rich. & Meck. R. R. Co., 88 Va., 431,	-	-	-	426, 440
Hunt v. Rousmaniere, 1 Pet., 1-15-16,	-	-	-	316, 521
Hutcheson v. Grubbs, 80 Va., 251,	-	-	-	339

Improvement Co. v. Andrew, 86 Va., 270,	-	-	-	408
Imperial Fire Ins. Co. v. Coos County, 151 U. S. 452,	-	-	-	293
Insurance Co. v. Norton, 86 U. S., 234,	-	-	-	280
Insurance Co. v. Wilkinson, 13 Wall., 222-235,	-	-	-	282
Insurance Co. v. Clemmitt, 77 Va., 366,	-	-	-	339, 713
Insurance Co. v. Rodel, 95 U. S., 238,	-	-	-	590
Insurance Co. v. Barley, 16 Gratt., 388,	-	-	-	652
Iron, Ship, &c., Works v. Nutteral, 119 Pa. St., 149,	-	-	-	692
Izard v. Middleton, 1 Desaus., 116,	-	-	-	730
Jameson v. Jameson, 86 Va., 51,	-	-	-	411
Jeffries v. Life Ins. Co., 22 Wall., 47,	-	-	-	293
Jennings v. Shackett, 30 Gratt., 765,	-	-	-	477
Jesson v. Wright, 2 Bligh., 1,	-	-	-	581
Johnson v. Gibbons, 27 Gratt., 632,	-	-	-	238
Johnson v. Dorsey, 7 Gill., 269,	-	-	-	380
Johnson v. Hubbell, 10 N. J. Eq., 332,	-	-	-	730
Johnson v. Jennings, 10 Gratt., 1,	-	-	-	777
Jones v. Rixey, 79 Va., 657,	-	-	-	62
Jones' Case, 87 Va., 63,	-	-	-	788, 789
Kanaga v. Taylor, 7 Ohio St., 134; 70 Amer. Dec., 65,	-	-	-	506
Kea v. Robeson, 5 Ired. Eq., 373,	-	-	-	841
Keith v. Clark, 97 U. S., 454,	-	-	-	32, 35
Kelley v. Colham, 95 U. S. Rep., 544,	-	-	-	744
Kenyon v. People, 26 N. Y., 203,	-	-	-	822
Kring v. Missouri, 107 U. S., 221,	-	-	-	788
Kingman v. Grantham, 51 Wis., 232,	-	-	-	44
Kentucky Wagon Manf'g Co. v. Lou. & Nash. R. R. Co., Amer. & Eng. R. R. Cases, Vol. 50, 90,	-	-	-	396
Kirby v. Taylor, 6 Johns. Chy., 242,	-	-	-	586
Kisner v. Indianapolis, &c., R. R. Co., 12 Amer. & Eng. R. R. Cases, 314,	-	-	-	530
Klinck v. Colly, 46 N. Y., 427,	-	-	-	557
Klock v. Hudson, 3 Johns. 375,	-	-	-	704
Klock v. People, 2 Park., 676,	-	-	-	334
Knot County v. Harshman, 133 U. S., 152,	-	-	-	175
Lamar's Ex'or v. Hale, 79 Va., 164,	-	-	-	475
Lane v. Tidball, Gilmer, 130,	-	-	-	373
Lake Shore, &c., R. R. Co. v. Prentice, 147 U. S., 101,	-	-	8, 9,	146
Lawrence v. Commonwealth, 86 Va., 579,	-	-	-	269
Law v. Crop, 1 Black's R., 539,	-	-	-	239
Lee v. Simpson, 134 U. S., 572, 590,	-	-	-	287
Lee's Case, 84 Va., 645,	-	-	-	625

Leighton v. Leighton, 2 Johns. Ch., 614,	-	-	-	197
Lexsy v. Hardin, 135 U. S., 100,	-	-	-	299
Lehigh Valley R. R. v. Pennsylvania, 145 U. S., 192,	-	-	-	299
Lelanon Ins. Co. v. Hoover, 113 Pa. St., 591,	-	-	-	280
Leloup v. Port of Mobile, 127 U. S., 640, 647,	-	-	-	780
Lench v. Lench, 10 Ves., 511, 518,	-	-	-	485
Le Neve v. Le Neve, 2 W. & N. L. C., 121, 205,	-	-	-	489
Lewis v. Overby, 31 Gratt., 619,	-	-	-	571
Lewis v. Long, 3 Munf., 136,	-	-	-	150
Lewis' Case, 78 Va., 732,	-	-	-	369
Lincoln v. Chadburne, 56 Me., 197,	-	-	-	153
Linton v. Laycock, 33 Ohio St., 128,	-	-	-	411
Livingston v. Roosevelt, 1 Am. L. Cases, 447,	-	-	-	202
Loeb v. Pierpoint, 58 Iowa, 469,	-	-	-	204
Long v. Warren, 68 N. Y., 426,	-	-	-	724
Long v. Pa. R. R. Co., 141 Pa. St., 343,	-	-	-	837
Lockwood v. Crawford, 18 Conn., 361,	-	-	-	51
Lore v. Hash, 89 Va., 277,	-	-	-	713
Louisville, &c., v. Donnegan, 34 Ame. & Eng. R. R. Cases, 122,	-	-	-	530
Lowe v. Trundle, 78 Va., 65,	-	-	-	723
Lunbard v. Aldrich, 8 N. H., 31,	-	-	-	842
Lynchburg Fire Ins. Co. v. West, 76 Va., 575,	-	-	292,	295
Lyon v. Richmond, 2 John. Ch., 51-60,	-	-	-	315
Magarity v. Shipman, 82 Va., 806, 784,	-	-	269, 563,	685
Manhattan Fire Ins. Co. v. Weill & Ullman, 28 Gratt., 389, 395,	-	-	-	282
Marble Co. v. Ripply, 10 Wall., 359,	-	-	-	164
Marsh v. Fulton Co., 10 Wall., 676,	-	-	-	38
Marks v. Petersburg R. R. Co., 88 Va., 1,	-	-	21, 266,	497
Marsh v. Terrell, 2 Hagg., 122,	-	-	-	858
Martin v. Kirby, 11 Gratt., 67,	-	-	-	410
Mason v. Chappell, 15 Gratt., 572,	-	-	-	717
May v. Joynes, &c., 20 Gratt., 692,	-	-	-	640
McAdo v. R. R. Co., 105 N. C., 140,	-	-	-	540
McChesney v. Brown, 25 Gratt., 393,	-	-	-	42
McConn v. R. R. Co., 50 N. Y., 176,	-	-	-	781
McCrowell v. City of Bristol, 87 Va., 652,	-	-	-	79
McCormick v. Wright, 79 Va., 524,	-	-	197,	339
McCullough v. Summerville, 8 Leigh, 415,	-	-	-	202
McCullough v. Dashiell, 85 Va., 41,	-	-	-	713
McDaniel v. Baskerville, 13 Gratt., 228,	-	-	-	159
McDaniel's Case, 77 Va., 281,	-	-	-	676
McDowell v. Goodwin, 12 Amer. Dec., 685,	-	-	-	758
McGalvey v. Virginia, 135 U. S., 668,	-	-	-	611
McGill's Appeal, 61 Pa. St., 46,	-	-	-	411

McFreeman's Case, 33 N. J. Eq. Rep., 384,	-	-	-	485
McVeigh v. Underwood, 23 Gratt., 419,	-	-	-	423
Medley v. Medley, 81 Va. 285,	-	-	-	288
Medley Petitioner, 134 U. S., 160,	-	-	-	788
Meredith v. R. R. Co., 108 N. C., 616,	-	-	-	540
Merrill v. Monticello, 138 U. S. 673,	-	-	-	38
Meyers, &c., receivers v. Trice, 86 Va., 835,	-	-	-	433
Michie v. Jeffries, 21 Gratt, 347,	-	-	-	376
Middleton v. Arnolds, 13 Gratt., 489,	-	-	-	31
Miller v. Ammon, 145 U. S., 421,	-	-	-	31
Miller v. Blose, 30 Gratt., 751-747,	-	-	-	74, 477
Miller v. Life Ins. Co., 12 Wall., 285,	-	-	-	280, 281
Miller v. Cook, 77 Va., 806,	-	-	-	339
Miller v. Trevilian, 2 Rob. (Va.) 25,	-	-	-	374
Miller v. Argyle, 5 Leigh, 460,	-	-	-	374
Miller & others v. Ga. R. R., & Banking Co., 50 Amer. & Eng. R. R.				
Cases, p. 70.	-	-	-	396
Miller v. Mansfield, 112 Mass., 260,	-	-	-	396
Minnesota v. Barber, 136 U. S., 313,	-	-	-	32
Minneapolis R. R. Co. v. Beckwith, 129 U. S., 26,	-	-	-	130
Missouri Pacific R. R. Co. v. Humes, 115 U. S., 512,	-	-	-	130
Missouri R. R. Co. v. Mackey, 127 U. S., 205,	-	-	-	130
Moffitt v. Bickle, 21 Gratt., 280,	-	-	-	697
Moore v. R. & D. R. R. Co., 78 Va.,	-	-	-	62
Morris' Adm'r v. Fitz Randolph, 6 Leigh, 175, 185,	-	-	-	164
Moore v. Green, 90 Va., 181,	-	-	-	231
Moon v. Stone, 19 Gratt., 130, 242,	-	-	-	410, 581
Moore v. Brooks, 12 Gratt, 135,	-	-	-	581
Morgan's Case, 7 Gratt., 592,	-	-	-	93
Morrison v. Lowell, 82 Va., 591,	-	-	-	197
Mosby's Adm'r v. Mosby's Adm'r, 9 Gratt., 584,	-	-	-	288
Mott v. Clark, 9 Barr, 400,	-	-	-	489
Mountain v. Bennett, 1 Cow., 353,	-	-	-	857
Moyer v. Hinman, 13 N. Y., 180,	-	-	-	15
Miller v. Stone, 84 Va., 834,	-	-	-	381
Mendorf v. Kilburn, 4 Md., 459,	-	-	-	730
Muse v. Farmer's Bank, 27 Gratt., 252,	-	-	-	697
Myers v. Commonwealth, 90 Va., 785,	-	-	-	824
Nagle v. Newton, 22 Gratt., 814,	-	-	-	806, 834
Nalle v. V. & M. R. R. Co., 88 Va., 948,	-	-	-	520
National Bank v. Commonwealth, 9 Wall., 353,	-	-	-	792
National Bank v. Ins. Co., 95 U. S., 673,	-	-	-	295
Nashville, &c., R. R. Co. v. Alabama, 128 U. S., 96,	-	-	-	301
Neal v. Clark, 95 U. S. Rep., 704,	-	-	-	477

Neimeyer v. Wright, 75 Va., 239, -	-	-	-	32
Nelson v. Fotterall, 7 Leigh, 194, -	-	-	-	53
Nelson v. Bridges, 2 Beav., 239, -	-	-	-	835
Newberry v. Williams, 89 Va., 298, -	-	-	-	269
New York, &c., R. R. Co. v. Bristol, 151 U. S., 556, 570,	-	-	-	131, 133
N. & W. R. R. Co. v. Wysor, 82 Va., 250, -	-	-	-	6, 395
N. & W. R. R. Co. v. Commonwealth, 88 Va., 103, -	-	-	-	32, 300
N. & W. R. R. Co. v. W. M. Anderson, 90 Va., 1, -	-	-	-	142
N. & W. R. R. Co. v. Carper, 88 Va., 556, -	-	-	-	265
N. & W. R. R. Co. v. Irvine, 84 Va., 553, -	-	-	-	395
N. & W. R. R. Co. v. Cottrell, 83 Va., 519, -	-	-	-	408
N. & W. R. R. Co. v. Harman's Adm'r, 83 Va., 553-557, -	-	-	-	541
Norton v. Shelby County, 118 U. S., 425, -	-	-	-	680
Norwich Lock Mfg. Co. v. Hockaday, 89 Va., 557, -	-	-	-	538
Norwood v. R. R. Co., 111 N. C., 236, -	-	-	-	540
Noyes, Ex'or, v. Humphreys, 11 Gratt., 636, -	-	-	-	614
O'Connell's Case, 20 Md., 212, -	-	-	-	408
Offut v. Flagg, 10 N. H., 46, -	-	-	-	506
Offlender v. Ford, 86 Va., 920, -	-	-	-	269
Ogilvie v. Knox. Ins. Co., 22 How., 380, -	-	-	-	798
Oliver v. Piatt, 3 How., 485, -	-	-	-	477
Osborn v. Phelps, 19 Conn., 63, -	-	-	-	521
Overseers of Poor v. Bank of Va., 2 Gratt., 551, -	-	-	-	477
Padgett v. Lawrence, 10 Paige Ch. R., 170 ; 40 Amer. Dec., 232, -	-	-	-	491
Page v. Clopton, 30 Gratt., 415, 429, -	-	-	-	10
Pannill v. McKinley, 9 Gratt., 1, -	-	-	-	519
Parcell v. Stryker, 41 N. Y., 480, -	-	-	-	730
Parker v. Moulton, 114 Mass., 99, -	-	-	-	723
Parkins v. Knight, 15 Sim., 83, -	-	-	-	411
Parkhurst v. Van Courtland, 1 John. Ch., 273, -	-	-	-	731
Patterson v. Eakin, 87 Va., 49, -	-	-	-	204
Patterson v. Hawthorne, 12 S. & R., 112, -	-	-	-	411
Patterson v. Wallace, 1 Macq., 748, -	-	-	-	496
Patterson's Case, 84 Va., 769, -	-	-	-	625
Paxton v. Rich, 85 Va., 378-382, -	-	-	-	807
Penn. R. R. Co. v. Miller, 132 U. S., 75, -	-	-	-	132
Penn. Co. v. Roy, 102 U. S., 452, -	-	-	-	141
Pennoyer v. Neff, 95 U. S., 714, -	-	-	-	835
People v. Vermilyea, 7 Cow., 383, -	-	-	-	321, 403
People v. Clark, 33 Mich., 112, -	-	-	-	823
People v. Brewer, 27 Mich., 134, -	-	-	-	823
People v. Cent. R. R. Co., N. Y., 486, -	-	-	-	937
Perry v. Ruby, 81 Va., 317, -	-	-	-	632

<i>Peshine v. Shepperson</i> , 17 Gratt., 472-488,	-	-	-	9
<i>Peterson v. Kaigler</i> , (Ga.), 3 S. E. R., 655,	-	-	-	506
<i>Pettit v. Jennings</i> , 2 Rob. (Va.), 676,	-	-	-	570
<i>Phelps v. Seeley</i> , 22 Gratt., 529-773,	-	-	-	478, 485
<i>Philadelphia & R. R. Co. v. Quigley</i> , 21 How., 202,	-	-	-	9
<i>Phillips v. Thompson</i> , 1 Johns. Ch. 131,	-	-	-	733, 834
<i>Pittsburg, &c., Ry. Co. v. Adams</i> , 105 Ind., 151,	-	-	-	496
<i>Poland v. Brownell</i> , 131 Mass., 138,	-	-	-	725
<i>Polk v. State</i> , 40 Ark., 482,	-	-	-	823
<i>Porter v. Thrall</i> , 22 Vt., 262,	-	-	-	316
<i>Postal Tel. Cable Co. v. Charleston</i> , 153 U. S., 692,	-	-	-	780
<i>Preston v. Bowman</i> , 6 Wheat., 582,	-	-	-	704
<i>Price v. Campbell</i> , 5 Call., 115,	-	-	-	713
<i>Priestly v. Fowler</i> , 3 M. & W., 1,	-	-	-	496
<i>Proctor v. Thrall</i> , 22 Vt., 262,	-	-	-	316
<i>Provident Institution v. Jersey City</i> , 113 U. S., 506,	-	-	-	132
<i>Putnam v. Day</i> , 22 Wall., 60,	-	-	-	25
 <i>Quarles v. Lacy</i> , 4 Munf., 251,	-	-	-	 373
 <i>Railroad Co. v. Reed</i> , 10 Wall., 176,	-	-	-	 837
<i>Railroad Co. v. Houston</i> , 95 U. S. R., 702,	-	-	-	21, 266
<i>Railroad Co. v. Johnson</i> , 84 Va., 713,	-	-	-	306
<i>Railroad Co. v. Williams</i> , 86 Va., 165,	-	-	-	306
<i>Railroad Co. v. Ayers</i> , 84 Va., 679,	-	-	-	306
<i>Railroad Co. v. Rudd</i> , 86 Va., 648,	-	-	-	306
<i>Railroad Co. v. Fort</i> , 17 Wall., 553,	-	-	-	496
<i>Railroad Co. v. Colfelt</i> , 27 Gratt., 779-780,	-	-	-	502
<i>Railroad Co. v. Brown</i> , 89 Va., 753,	-	-	-	670
<i>Ratcliff v. Anderson</i> , 31 Gratt., 105,	-	-	-	788
<i>Rawlings v. Rawlings</i> , 75 Va., 76,	-	-	-	25
<i>Ray v. Noseworthy</i> , 23 Wall., 136,	-	-	-	473
<i>Read's Case</i> , 22 Gratt., 947,	-	-	-	117, 365
<i>Recard v. Williams</i> , 7 Wheat., 105,	-	-	-	704
<i>Rex v. Loxdale</i> , 1 Burr., 445,	-	-	-	34
<i>Reynolds v. Necessary</i> , 88 Va., 125,	-	-	-	520
<i>Rice v. Hartman</i> , 84 Va., 251,	-	-	-	730, 818
<i>Richmond F. & P. R. R. Co. v. Ashby</i> , 79 Va., 130,	-	-	-	6
<i>R. & D. R. R. Co. v. George</i> , 88 Va., 229,	-	-	-	209
<i>Rich. & A. R. R. Co. v. Moon</i> , 78 Va., 745-750,	-	-	-	306
<i>R. & D. R. R. Co. v. Resdon's Adm'r</i> , 87 Va., 335,	-	-	-	408, 625
<i>R. & D. R. R. Co. v. Moore</i> , 78 Va., 96,	-	-	-	408
<i>R. & D. R. R. Co. v. Fort</i> , 17 Wall., 553,	-	-	-	496
<i>Richardson v. Davis and Wife</i> , 21 Gratt., 709,	-	-	-	158, 474
<i>Richard v. Holmes</i> , 18 How., 143,	-	-	-	380

CASES CITED.

XXV

Richlands Iron Co. v. Elkins, 90 Va., 249,	-	-	-	496
Rider v. Gray, 69 Amer. Dec., 135,	-	-	-	164
Riley v. Batendale, 6 Hurst & N., 446,	-	-	-	261
Rivers v. Rivers, 3 Desaus., 190,	-	-	-	730
Rixey v. Ward, 3 Rand., 52,	-	-	-	261
Rixey v. Pearre, 89 Va., 113,	-	-	-	815
Roanoke L. & Imp. Co. v. Kain & Hickson, 80 Va., 592,	-	-	268,	589
Robertson v. Hogshead, 3 Leigh, 667, 1 Story Eq., 693,	-	-	-	520
Robinson v. Commonwealth, 88 Va., 900,	-	-	-	90
Robinson's Case, 32 Gratt., 866,	-	-	-	546
Rollins v. Shelby Taxing District, 120 U. S., 487,	-	-	-	299
Rorer Iron Co. v. Trout, 83 Va., 397, 414,	-	-	-	29
Rorer Heirs v. Roanoke Nat. Bank, 87 Va., 589,	-	-	-	742
Rowley v. Stoddard, 7 Johns., 207,	-	-	-	586
Rowe v. Bentley, 29 Gratt., 756, 763,	-	-	339,	475
Ross v. Bank of Benlingron, 1 Aiken, 43, 15 Amer. Dec., 664,	-	-	-	491
Runnell v. Dilworth, 111 Pa. St., 343,	-	-	-	692
Russell's Case, 28 Gratt., 936,	-	-	321,	403
Saint John v. Benedict, 6 Johns. Ch., 14,	-	-	-	519
Saunders v. Commonwealth, 79 Va., 522,	-	-	-	169
Savage's Case, 84 Va., 582,	-	-	94,	982
Scally's Case, 27 Md., 589,	-	-	-	408
Scott v. Ashlin, 85 Va., 588,	-	-	-	571
Scott v. Lloyd, 9 Pet., 418,	-	-	-	269
Scribner v. Crane, 2 Paige, 147,	-	-	-	884
Seller's Ex'or v. Reed, 88 Va., 377,	-	-	-	411
Segalls v. Bells, 43 Amer. Dec., 363,	-	-	-	837
Shadrach v. Woolfolk, 32 Gratt., 707,	-	-	-	650
Shannon v. Hanks, 88 Va., 338,	-	-	-	736
Shen. Valley R. R. Co. v. Dunlop & wife, 86 Va.,	-	-	163,	164
Shenandoah Valley R. R. Co. v. Lewis, 76 Va., 833,	-	-	-	519
Sheelor v. C. & O. R. R. Co., 81 Va., 202,	-	-	-	625
Shelton's Case, 89 Va., 450,	-	-	-	637
Sherlock v. Alling, 93 U. S., 99,	-	-	-	300
Shipman v. Fletcher, 83 Va., 349,	-	-	-	563
Sholes v. Carr, 3 Munf., 10,	-	-	-	197
Shortel v. St. Joseph, 104 Mo., 114,	-	-	-	692
Shortwell v. Murry, 1 Johns. Ch., 512,	-	-	-	315
Shropshire v. Reno, 5 J. J. Marsh., 91,	-	-	-	859
Shurtz v. Johnson, 28 Gratt., 657,	-	-	372,	380
Simmons v. Simmons, 33 Gratt., 441,	-	-	-	44
Siter, Price & Co. v. McClanachan, 2 Gratt., 312,	-	-	-	489
Slack v. Wood, 9 Gratt., 40,	-	-	-	175
Slaughter v. Tutt, 12 Leigh, 147-160,	-	-	-	560

<i>Slaughter v. Gerson</i> , 13 Wall., 379,	-	-	-	724
<i>Smith v. Agawam Canal Co.</i> , 2 Allen, 357,	-	-	-	155
<i>Smith v. O'Hara</i> , 43 Cal., 371,	-	-	-	155
<i>Smith v. Lambert</i> , 7 Gratt., 138,	-	-	-	238
<i>Smith v. Alabama</i> , 124 U. S., 465,	-	-	-	301
<i>Smith v. Chapman</i> , 1 H. & M., 240-302,	-	-	-	581
<i>Smith v. Richards</i> , 13 Pet., 26,	-	-	-	724
<i>Smith v. Bradford</i> , 76 Va., 758,	-	-	-	818
<i>Solenberger v. Gilbert</i> , 86 Va., 778,	-	-	-	814
<i>Soon Hing v. Crowley</i> , 113 U. S., 703-710,	-	-	-	32
<i>Southern Life Ins. Co. v. Booker</i> , 9 Heisk., Tenn., 606-613,	-	-	-	280
<i>South Mut. Ins. Co. v. Bates</i> , 28 Gratt., 585,	-	-	-	296
<i>Southern Development Co. v. Silva</i> , 125 U. S., 247,	-	-	-	723
<i>Sperry's Case</i> , 9 Leigh, 624,	-	-	-	636
<i>Spill v. Maule</i> , L. R., 4 Exch., 132,	-	-	-	559
<i>Sprouse's Case</i> , 81 Va., 374,	-	-	-	811
<i>Spurgeon's Case</i> , 86 Va., 652,	-	-	-	169
<i>State v. Lewis</i> , 1 Bay, 1,	-	-	-	321, 403
<i>State v. Bentley</i> , 44 Conn., 537,	-	-	-	364
<i>State v. Morphy</i> , 33 Iowa,	-	-	-	364
<i>State v. Brown</i> , 64 Mo., 367,	-	-	-	674
<i>State v. Doherty</i> , 60 Me., 504,	-	-	-	789
<i>State v. Fleming</i> , 66 Me., 142,	-	-	-	789
<i>State Bank v. City of Richmond</i> , 79 Va., 113,	-	-	-	792
<i>State v. Deitrick</i> , 51 Iowa, 467,	-	-	-	822
<i>State v. Heatherton</i> , 60 Iowa, 175,	-	-	-	822
<i>State v. McClintic</i> , 73 Iowa, 663,	-	-	-	823
<i>Steamboat Co. v. Brockett</i> , 121 U. S., 637,	-	-	-	6
<i>Steptoe v. Read</i> , 19 Gratt., 1,	-	-	-	697
<i>Stewart v. Palmer & Preston</i> , 80 Va., 625,	-	-	-	713
<i>Stoddard v. Hart</i> , 23 N. Y., 556,	-	-	-	521
<i>Stones v. Keeling</i> , 5 Call., 143,	-	-	-	391
<i>Storrs v. Barker</i> , 6 Johns. Ch., 169-70,	-	-	-	315
<i>Stout v. City Fire Ins. Co.</i> , 12 Iowa,	-	-	-	294
<i>Stovall v. Bank</i> , 78 Va., 188,	-	-	-	159
<i>Stover v. Great Western R. R. Co.</i> , 2 Y. & C. Ch., 84,	-	-	-	834
<i>Tabb v. Cabell</i> , 17 Gratt., 160,	-	-	-	477
<i>Taylor v. King</i> , 6 Munf., 366,	-	-	-	375
<i>Taylor v. Thomas</i> , 22 Wall., 700,	-	-	-	33
<i>Taylor v. Cleary</i> , 29 Gratt., 448,	-	-	-	582
<i>Telegraph Co. v. Texas</i> , 105 U. S., 460,	-	-	-	299, 779
<i>Tennessee v. Whitworth</i> , 117 U. S., 129,	-	-	-	792
<i>Terry v. Fitzgerald</i> , 32 Gratt., 851,	-	-	-	377
<i>Texas v. White</i> , 7 Wall., 700,	-	-	-	33

<i>Texas v. Chiles</i> , 21 Wall., 488, - - -	34
<i>Thatcher v. Powell</i> , 6 Wheat., 119, - - -	701
<i>Thayer v. Rock</i> , 13 Wend., 53, - - -	616
<i>The Piedmont Club v. Commonwealth</i> , 87 Va., 540, - - -	844
<i>Thomas v. City of Richmond</i> , 12 Wall., 349, - - -	31, 33, 39
<i>Thompson v. Carpenter</i> , 88 Va., 702, - - -	172
<i>Thompson v. Collins</i> , 4 Head. (Tenn.), 441, - - -	617
<i>Thurber v. Martin</i> , 2 Gray, 394, - - -	155
<i>Toogood v. Spyring</i> , 1 C. M. & R., 181, - - -	556
<i>Train v. Holland Ins. Co.</i> , 62 N. Y., 598, - - -	281
<i>Trans. Co. v. Downe</i> , 11 Wall., 130, - - -	837
<i>Trout v. Va. & Tenn. R. R. Co.</i> , 23 Gratt., 630, - - -	206, 222
<i>Troy v. Cape Fear, &c.</i> , R. R. Co., 99 N. C., 298; Amer. St., Re., 521, - - -	265
<i>Trunbo's Adm'r v. City Street Car Co.</i> , 89 Va., 780, - - -	362, 549
<i>Tucker's Case</i> , 88 Va., - - -	118
<i>Tucker v. Sandridge</i> , 82 Va., 535, - - -	349, 857, 860, 935
<i>Tunstall's Adm'r v. Withers</i> , 86 Va., 892, - - -	475, 572
<i>Tuttle v. Commonwealth</i> , 2 Gray, 505, - - -	347
<i>Tyler v. Site's Adm'r</i> , 88 Va., 470, - - -	408, 540
<i>Umbarger v. Watts</i> , 25 Gratt., 167, - - -	150, 502
<i>Underwood v. McVeigh</i> , 23 Gratt., 418, - - -	472
<i>Union, &c., R. R. Co. v. Cook</i> , 50 Am. & Eng. R. R. Cases, 89, - - -	396
<i>United States v. Fox</i> , 3 Mon. T., 513, - - -	333
<i>United States v. King</i> , 3 How., 783, - - -	841
<i>Upton v. Trillierock</i> , 91 U. S., 45, - - -	798
<i>Upton v. Englehart</i> , 3 Dill., 496, - - -	798
<i>Va. Mid. R. R. Co. v. White</i> , 84 Va., 498, - - -	9, 265, 343
<i>Va. F. & M. Ins. Co. v. Buck, &c.</i> , 88 Va., 517, - - -	293, 776
<i>Va. Coupon Cases</i> , 114 U. S., 269, - - -	611
<i>Va. F. & M. Ins. Co. v. Vaughan</i> , 88 Va., 835, - - -	663
<i>Va. & Tenn. R. R. Co. v. Sayers</i> , 26 Gratt., 328, - - -	722
<i>Vaiden's Case</i> , 12 Gratt., 717, - - -	369
<i>Van Allen v. Assessors</i> , 3 Wall., 573, - - -	792
<i>Vare v. Lancashire R. R. Co.</i> , 2 Herb., 728, - - -	261
<i>Vashon v. Greenhow</i> , 135 U. S., 713, - - -	602, 606
<i>Voorhis v. Westervelt</i> , 43 N. J., 642, - - -	135
<i>Wade v. Boxley</i> , 5 Leigh, 442, - - -	410
<i>Walker v. Bauckler</i> , 29 Gratt., 511, - - -	372, 374, 381
<i>Walters v. Farmers Bank</i> , 76 Va., 12, - - -	834
<i>Walton's Case</i> , 32 Gratt., 863, - - -	321, 403
<i>Ware v. Stephenson</i> , 10 Leigh, 155, - - -	498
<i>Warde v. White</i> , 86 Va., 212, 261, 750, - - -	9

Warren v. Saunders, 27 Gratt., 259,	-	-	-	175
Warwick v. Warwick, 31 Gratt., 70,	-	-	-	203
Wash. Tel. Co. v. Hobson, 15 Gratt., 138,	-	-	-	10
Welsh v. Commonwealth, 90 Va., 318,	-	-	-	404
Welton v. State of Missouri, 91 U. S., 275,	-	-	-	299
West Imp. Co. v. Smith, 85 Va., 306,	-	-	-	260
West Imp. Co. v. Andrew, 86 Va., 270,	-	-	-	260
West. U. Tel. Co. v. Pendleton, 122 U. S., 347,	-	-	299,	300
West. U. Tel. Co. v. Pettijohn, 88 Va., 296,	-	-	-	780
West. U. Tel. Co. v. Alabama, 132 U. S., 472,	-	-	-	780
West. U. Tel. Co. v. Tyler, 90 Va., 297,	-	-	-	780
West. U. Tel. Co. v. Taylor, 84 Ga., 408,	-	-	-	781
Westfall v. Cottrells, 24 West Va., 763,	-	-	-	842
White v. Conn. Ins. Co., 120 Mass., 330,	-	-	-	281
Whiting v. Town of West Point, 88 Va., 905-912,	-	-	-	379
Whittle v. Saunders, 75 Va., 573,	-	-	-	713
Whitton v. Saunders, 75 Va., 563,	-	-	-	231
Widoe v. Webb, 20 Ohio St., 431,	-	-	-	614
Wilcox v. Pearman, 9 Leigh, 146,	-	-	-	570
Wilkins v. Gordon, 11 Leigh, 547,	-	-	-	374
Williams v. Commonwealth, 88 Va., 609,	-	-	-	119
Williams v. Pullman Car Co., 33 Amer. & Eng., 414,	-	-	-	141
Williamson v. Massie, 33 Gratt., 237,	-	-	-	609
Williams v. Morris, 95 U. S., 444,	-	-	-	731
William & Mary Col. v. Powell, 12 Gratt., 372,	-	-	-	818
Wilson v. State, 73 Ala., 527,	-	-	-	823
Wilson v. Inloes, 11 Gil. & J., 551,	-	-	-	803
Wirtz v. Osborn, 83 Va., 227,	-	-	-	503
Wonder's Case, 32 Md., 419,	-	-	-	408
Woodson v. Leyburn, 83 Va., 847,	-	-	-	713
Wotton v. Copeland, 7 Johns. Ch., 140,	-	-	-	735
Wright v. Puckett, 22 Gratt., 370,	-	-	-	733
Yates v. Law, 86 Va., 117,	-	-	-	772
Young v. Barner, 27 Gratt., 103,	-	-	-	590
Young v. Martin, 8 Wall., 354,	-	-	-	362
Zeigler v. Gram, 13 S. & R., 102,	-	-	-	780
Zirkle v. McCue, 26 Gratt., 532,	-	-	-	735

STATUTES CITED.

Code 1887, § 2844,	-	-	-	-	29
Code 1860, ch. 198, §§ 16, 17, 19,	-	-	-	-	31
Code 1887, § 2946,	-	-	-	-	56
Act of February 26, 1886,	-	-	-	-	93, 94
Code 1887, § 4202,	-	-	-	-	93
Code 1887, § 4019,	-	-	-	-	97, 361
Code 1887, § 3156,	-	-	-	-	98
Acts 1887-'88, p. 18,	-	-	-	-	98
Code 1887, §§ 2485, 2486,	-	-	-	-	128, 131, 133, 135
Code 1887, § 4243,	-	-	-	-	133
Code 1887, §§ 3215, 3451,	-	-	-	-	175
Code 1887, § 2706,	-	-	-	-	196
Code 1887, § 2678,	-	-	-	-	198
Code 1887, § 3263,	-	-	-	-	275
Code 1887, § 2526,	-	-	-	-	287
Code 1887, § 1292,	-	-	-	-	298, 302, 779
Code 1887, §§ 712, 145,	-	-	-	-	298
Code 1887, § 2498,	-	-	-	-	317
Code 1887, § 4016,	-	-	-	-	331
Acts 1889-'90, p. 70,	-	-	-	-	332
Code 1887, §§ 4181, 4182, 4183,	-	-	-	-	346
Code 1887, § 3454,	-	-	-	-	349
Code 1887, § 3387,	-	-	-	-	350
Code 1887, §§ 4093, 4018,	-	-	-	-	358
Acts 1891-'92, p. 962,	-	-	-	-	365
Code 1887, § 3484,	-	-	-	-	365
Code 1860, ch. 117, § 6,	-	-	-	-	376
Code 1873, ch. 113, § 6,	-	-	-	-	376
Code 1887, § 2442,	-	-	-	-	379
Code 1887, § 3805,	-	-	-	-	387
Code 1887, §§ 3999, 4012, 4076,	-	-	-	-	388
Code 1887, §§ 726, 407,	-	-	-	-	389
Code 1887, § 4071,	-	-	-	-	391

Acts 1785, ch. 60,	-	-	-	-	-	396
Acts 1794, ch. 93, § 19,	-	-	-	-	-	396
Code 1887, §§ 1202, 1203,	-	-	-	-	-	396
Code 1887, §§ 3365, 1078,	-	-	-	-	-	433, 443
Code 1887, §§ 2459, 2460,	-	-	-	-	-	453
Code 1873, ch. 124, § 2,	-	-	-	-	-	453
Acts 1887-88, p. 504,	-	-	-	-	-	454
Code 1887, §§ 2464, 2965,	-	-	-	-	503, 645, 646	
Code 1887, § 1258,	-	-	-	-	508, 509	
Code 1887, §§ 1259, 1266, 2038, 1261,	-	-	-	-	509, 511	
Code 1887, § 3708,	-	-	-	-	545, 546	
Code 1887, § 3709,	-	-	-	-	549	
Code 1887, §§ 4001, 4040,	-	-	-	-	551	
Code 1887, §§ 2462, 2500,	-	-	-	-	575, 576	
Acts 1889-90, p. 108,	-	-	-	-	643	
Code 1887, §§ 3091, 3092, 3094,	-	-	-	-	643	
Code 1887, § 3283,	-	-	-	-	652	
Act March 27, 1876,	-	-	-	-	681	
Code 1887, § 3299,	-	-	-	-	694, 715, 720	
Code 1887, § 3395,	-	-	-	-	697	
Code 1887, § 2725,	-	-	-	-	703	
Code 1887, § 2822,	-	-	-	-	709, 710	
Code 1887, § 2853,	-	-	-	-	727	
Code 1887, § 2517,	-	-	-	-	730	
Code 1887, § 2840,	-	-	-	-	731	
Code 1887, § 3454,	-	-	-	-	736	
Code 1887, §§ 2746, 2747,	-	-	-	-	747	
Code 1887, § 3900,	-	-	-	-	760	
Code 1887, §§ 949, 951,	-	-	-	-	769	
Code 1887, § 3211,	-	-	-	-	780	
Code 1887, § 3156,	-	-	-	-	787	
Acts 1852-'53, p. 46,	-	-	-	-	787	
Act January 18, 1888,	-	-	-	-	787	
Acts 1893-'94, p. 494,	-	-	-	-	788	
Acts 1889-'90, p. 201,	-	-	-	-	791	
Code 1887, § 3679,	-	-	-	-	823	
Code 1873, ch. 118, § 3,	-	-	-	-	856	
Code 1887, § 2513,	-	-	-	-	861	
Code 1887, § 2574,	-	-	-	-	862	
Constitution, Art. 11, § 1, ch. 2,	-	-	-	-	936	

VIRGINIA REPORTS.



ERRATA.

Pages 735 and 736 of this book are paged in duplicate, and pages 783 and 784 are not enumerated. These errors do not affect the text of the book nor the references in the index.

CASES DECIDED
IN THE
SUPREME COURT OF APPEALS
OF
VIRGINIA.

Wytheville.

NORFOLK & WESTERN RAILROAD CO. v. ANDERSON.

JUNE 15th, 1893.

1. *CARRIERS—Construction of Contract—Ejection of Passenger—Case at bar.*—Ticket provided that when presented to conductor, passenger should sign his name thereto, and "otherwise identify" himself as original purchaser thereof. Passenger offered to sign ticket, which offer conductor refused, and ejected him from train for refusing to pay fare.

HELD:

Conductor not entitled to require passenger to "otherwise identify" himself, and defendant company was liable in damages for the expulsion.

2. *IDEM—Exemplary Damages.*—Where in such a case the defendant company subsequently ratified conductor's acts, plaintiff is entitled to exemplary damages.
3. *IDEM—Measure of Damages.*—Amount of defendant company's liability must depend on the circumstances, and be left largely to discretion of the jury, whose verdict will not be disturbed unless it evinces passion, prejudice, or corruption.
4. *PRACTICE AT COMMON LAW—Waiver of Objection.*—Where trial court ruled that certain admitted evidence was illegal and promised to hear later, a
- VOL. XC—1

motion to exclude it, and no exception was taken, and there was a failure to call the court's attention before verdict, such failure amounts to a waiver of the objection.

5. CASES DISTINGUISHED.—*Railroad Co. v. Wyser*, 82 Va., 250, compared with and distinguished from case at bar.

Error to judgment of circuit court of Nansemond county, rendered April 11, 1892, in an action of trespass on the case, wherein W. M. Anderson was plaintiff, and the Norfolk and Western Railroad Company was defendant. The action was brought to recover damages for the alleged wrongful expulsion of the plaintiff from one of the defendant's passenger trains. There was a verdict and judgment for the plaintiff for two thousand dollars damages and costs.

The declaration states in substance, and the evidence shows, that on the 17th of March, 1890, the plaintiff purchased of the defendant company a thousand mile or commutation ticket for travel on its road; that attached to the ticket, and forming part of it, were certain printed conditions, the first and second of which were in these words: "1st. That this ticket is good only for the person in whose name it is issued, and shall be taken up and forfeited if presented by any other person. 2d. That when requested by the conductor, at the time the ticket is presented for passage, or the station baggage agent, when presented for the purpose of having baggage checked, I will sign my name in the presence of either on the back of the highest numbered coupons required for the trip, and will otherwise identify myself as the original purchaser of the ticket."

At the bottom of the printed conditions (fourteen in number), the plaintiff was required to sign his name, which he did in the presence of the attesting witness, W. C. Masi, city ticket agent of the defendant company at Norfolk.

On the 24th of May following, the plaintiff took passage on one of the defendant's passenger trains, leaving Norfolk in the morning, intending to go to Suffolk, a point on the defendant's road about twenty miles west of Norfolk, and thence, that

Statement.

afternoon, to Richmond *via* Petersburg. Before entering the train he presented his ticket, then containing unused coupons for four hundred miles of travel, to the defendant's baggage agent at Norfolk, who, without raising any question as to his identity, checked his baggage through to Richmond.

The plaintiff at the time was a travelling salesman for the A. B. C. Chemical Company.

When the conductor came around to collect fares, after the train left Norfolk, the plaintiff presented him his ticket, from which to extract the necessary coupons for the travel between Norfolk and Suffolk. The conductor asked if the signature, above mentioned, was the plaintiff's, to which the latter replied that it was. But he refused to recognize the ticket, unless the plaintiff would identify himself. The latter then offered to sign his name as stipulated. But the conductor refused to accept that as evidence of identity, saying to the plaintiff that if he signed his name he would, of course, sign the name that was on the ticket, and, besides, that he (the conductor) was no judge of handwriting. The plaintiff then remarked that he was a stranger in that section; that he knew no one on the train, and that he had no other means of identifying himself than by writing his name. The conductor still refused to accept such evidence, and inquired of the plaintiff if he had any letters on his person addressed to himself. To this the plaintiff replied that he had not; that his mail was in his baggage, which had been checked through to Richmond. The conductor then insisted that he go into the baggage car and get out of his baggage any letters therein, which he declined to do as unreasonable, as the train was then running at its usual rate of speed.

The conductor next inquired if he had in his pocket an order-book, such as drummers usually carry, whereupon the plaintiff produced one, upon the fly-leaf of which was dimly written in pencil: "E. W. Wells, 248 Halifax St," and on the same page, below Wells' name, was the following: "709 E.

Statement.

Clay street, Anderson," the latter being also written in pencil, and more dimly. It does not appear, however, that the conductor saw, or had his attention called to, the last name, or that the plaintiff himself knew at the time it was there. In fact, he says he did not. The conductor, upon seeing Wells' name, inquired how it came to be there, to which the plaintiff answered that he had copied it from the city directory of Petersburg, as the name of a person he wished to see; whereupon the conductor took up the plaintiff's ticket, and told him he would have to pay fare. To this the latter replied that he would not pay fare, and demanded a receipt for his ticket, which the conductor at first refused to give unless he would pay fare. Before he took up the ticket, the conductor said to the plaintiff: "If you will return this ticket to the 'scalper' from whom you got it, he will no doubt refund you your money."

Meanwhile the train was nearing Suffolk. "When the train stopped at the depot," says the plaintiff in his testimony, "I kept my seat, which was next to the window, and when the train was about ready to start, the conductor came to the window and told me he could not carry me any further, and that I must get off. I told him I would not get off, and that I would stay on the train until I got a receipt for my ticket. He then told me if I would come into the office in the depot, he would write me a receipt. I went in, and he wrote a receipt in the name of E. W. Wells, seeing which I told him that was not my name. He answered that was the name he knew me by, and that he had every reason to believe it was my name. I then turned to the freight agent, telegraph operator, or some other employee, who was standing by, and asked him to witness that I protested that that was not my name, but he said he would have nothing to do with it. By that time the conductor had boarded the train, and the train pulled out."

The plaintiff then goes on to say that he transacted his business that day in Suffolk, and took the evening train for Richmond, paying his fare.

Soon after the plaintiff's arrival in Richmond the secretary and treasurer of the chemical company reported the occurrences just mentioned to the defendant's passenger agent in Richmond, who in turn communicated on the subject with the general passenger agent at Roanoke. These officers, however, although assured that the plaintiff's ticket had been wrongfully taken up—that is, that he was the *bona fide* purchaser of the ticket, as he had represented to the conductor, refused to return it unless the plaintiff would surrender the conductor's receipt, which he declined to do. Indeed, the general passenger agent ultimately went further, for in his letter to the plaintiff's attorney he wrote as follows:

“Dear Sir,—Yours of yesterday, requesting that thousand-mile ticket bearing name of W. M. Anderson, lifted by a conductor of this road, be sent to you, is received. I regret that I must decline this request. The conditions of the contract under which this ticket was sold having been violated, the right to use the same for transportation has been forfeited.”

At the trial there was little or no material conflict in the evidence. The foregoing is the substance of the case.

George S. Bernard and *W. H. Mann*, for plaintiff in error.

Jackson Guy and *E. E. Holland*, for defendant in error.

LEWIS, P., (after stating the case) delivered the opinion of the court.

In determining whether the judgment is right or not, it is important to observe, in the first place, what the contract between the parties was. Its language is that “when requested by the conductor at the time this ticket is presented for passage. * * I (the purchaser of the ticket) will sign my name in the presence of the conductor on the back of the highest numbered coupons required for the trip, and will otherwise

Opinion.

identify myself as the original purchaser of the ticket." This means that the person presenting the ticket will identify himself when identification is required, first, by signing his name, and, secondly, in any other manner that may be reasonably required. It is not that he will sign his name if that particular mode of identification is requested by the conductor, but that he will do so whenever called upon by the conductor to identify himself. This was evidently the intention of the parties, and the words employed are not inconsistent with such intention.

Assuming this to be the true construction of the contract, we are of opinion that the plaintiff is entitled to recover.

As was said in *R., F. & P. R. R. Co. v. Ashby*, 79 Va., 130, "the carrier's duty is to carry his passengers safely and respectfully, and if he entrusts this duty to his servants, the law holds him responsible for the manner in which they execute the trust." The same principle has been repeatedly affirmed by the Supreme Court of the United States. "A common carrier," says that court, "undertakes absolutely to protect his passengers against the misconduct of his own servants engaged in executing the contract," and "whether the act of the servant be one of omission or commission, whether negligent or fraudulent, if it be done in the course of his employment, the master is liable." *Steamboat Co. v. Brockett*, 121 U. S., 637.

The defendant relies on the case of *N. & W. R. R. Co. v. Wysor*, 82 Va., 250; but that case widely differs from the present. There the plaintiff, in wilful violation of the contract, tendered detached coupons for his passage, which the conductor refused to receive. The evidence, moreover, showed that he got on the train with the expectation and intention of being ejected therefrom, with a view of making a case for damages, and this court justly held he was not entitled to recover.

But here no such circumstances exist, nor is there anything upon which to impute bad faith to the plaintiff. When his

Opinion.

offer to identify himself in the only mode specifically stipulated for was rejected, he was warranted in refusing to do more. Had he been permitted to sign his name, and had the conductor, upon examining the signature, been left in doubt as to the sufficiency of the evidence, he might then have required any additional evidence of identity that was reasonable. But when he arbitrarily refused to receive the evidence, which it was his primary duty to have accepted, accompanying his refusal, as he did, with gross insult to the plaintiff, which was afterwards repeated at Suffolk, he had no right to require the plaintiff to "otherwise identify" himself. He had no right, in other words, to repudiate a part of the contract, and to require the plaintiff to comply with the residue.

And it makes no difference that he declared himself "not a judge of handwriting." For the purposes of a case like this, at least, the company in effect contracted that he was. At all events, it cannot now escape liability on the ground that he was not, for the contract must be taken in all its parts, and effect given to the whole.

There was, moreover, a further violation of the contract in taking up the ticket, inasmuch as the only stipulated ground of forfeiture was the presentation of the ticket for passage by a person other than the original purchaser thereof. And not only this, but after the circumstances of the case had been reported to the general passenger agent, the *alter ego*, of the company, he refused to return the ticket, thus ratifying what had been done.

We concur, therefore, in the view that the jury were not only warranted in finding for the plaintiff, but that the case is a proper one for exemplary damages. The conduct of the conductor was not only illegal, but may be justly termed wanton and malicious. "Every unlawful act," said the court, speaking by Judge Staples, in *Borland v. Barrett*, 76 Va., 128, "done wilfully or purposely, to the injury of another, upon slight provocation, is as against such person malicious, and the law

so presumes." And the subsequent *ratification* by the company of the acts complained of brings the case within the principle holding a corporation liable in exemplary damages for the misconduct of its agents. *Lake Shore, &c., Railway Co. v. Prentice*, 147, U. S., 101.

It is true the plaintiff was not forcibly ejected, but he was told by the conductor, after his ticket had been taken up, that he must get off the train, and what was done amounted, in contemplation of law, to an expulsion, though no force to remove him was exerted. His leaving the train as he did was induced by the deceptive promise of the conductor to give him the receipt he demanded, and it does not, therefore, lie in the company's mouth to say he was not expelled from, but voluntarily left, the train. It cannot, in other words, take advantage of the fraud of its own agent.

The next question, then, is whether the damages given by the jury are excessive. That the sum awarded is greater than the actual damage suffered by the plaintiff is not disputed. But it is to be considered that when exemplary damages are allowed, the object of the law is not only to recompense the sufferer, but to punish the offender, and thereby to deter others from like offending. In *Day v. Woodworth*, 13 How., 363, the court said: "It is a well-established principle of the common law that in actions of trespass and in all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence, rather than the measure of compensation to the plaintiff. We are aware that the propriety of this doctrine has been questioned by some writers, but if repeated judicial decisions for more than a century are to be received as the best exposition of what the law is, the question will not admit of argument." And in numerous subsequent decisions of the same court the rule has been declared that whenever the injury complained of has been inflicted maliciously or wantonly, and with circumstances of contumely or

Opinion.

indignity, the jury are not limited to compensatory damages, but may give such exemplary damages as, in their opinion, are called for by the circumstances of the case. *Philadelphia, &c., Railroad Co. v. Quigley*, 21 How., 202; *Barry v. Edmunds*, 116 U. S., 550; *Denver, &c., Railway v. Harris*, 122 *Id.*, 597; *Lake Shore, &c., Railway Co. v. Prentice*, 147 *Id.*, 101.

The same doctrine was enforced by this court in *Borland v. Barrett*, 76 Va., 128.

A corporation, like a natural person, may be held liable in exemplary damages for the act of an agent, where the act is participated in, or authorized, or, as in the present case, ratified by the principal. *Lake Shore, &c., Railway Co. v. Prentice*, 147 U. S., 101. And as the measure of the defendant's liability must depend upon the particular circumstances of each case, it is a matter left to the discretion of the jury, whose finding will not be disturbed, unless so out of the way as to evince passion, prejudice, partiality, or corruption in the jury. *Borland v. Barrett*, 76 Va., 128; *Peshine v. Shepperson*, 17 Gratt., 472, 488; *Farish v. Reigle*, 11 *Id.*, 697; *Va. Mid. R. R. Co. v. White*, 84 Va., 498; *Bertha Zinc Co. v. Beach*, 88 *Id.*, 303.

Referring to this rule in the recent case of *Ward v. White*, 86 Va., 212, which was an action for assault and battery, it was said:

"The reason for holding parties so tenaciously to the damages found by the jury in personal torts is, that in cases of this class there is no scale by which the damages are to be graduated with certainty. They admit of no other test than the intelligence of the jury, governed by a sense of justice. It is indeed one of the principal causes in which the trial by jury has originated."

Applying this rule to the circumstances of the present case, the verdict must stand. It is true the recovery is a large one; but it is not so disproportioned to the injury inflicted and the character of the offence as to "shock the understanding," or to induce the belief that the jury were influenced by improper

motives; and when this can be affirmed of a verdict in a case of this sort, it would be an invasion of the province of the jury, and, therefore, an abuse of power on the part of the court, especially an appellate court, to set it aside.

It is contended, however, that the circuit court erred at the trial in failing to exclude certain illegal evidence, and that for this error the judgment should be reversed. But there is nothing in this objection.

It appears that soon after the occurrences mentioned in the declaration, the plaintiff unsuccessfully attempted to travel on the defendant's road on the conductor's receipt for his ticket. After this had been narrated to the jury, the defendant's counsel objected to the evidence, on the ground that it was not relevant to the case stated in the declaration, and moved to exclude it. The judge ruled that the evidence was illegal, and said he would hear a motion to exclude it at a later state of the proceedings. To this there was no exception, nor was the court's attention again called to the matter, before the verdict was rendered, and that was a waiver of the objection. *Wash. Tel. Co. v. Hobson*, 15 Gratt., 122, 138; *Page v. Clopton*, 30 *Id.*, 415, 429; *Danville Bank v. Waddill*, 31 *Id.*, 469, 477.

This sufficiently disposes of the case, and renders it unnecessary to consider the assignment of error in regard to the instruction. It is enough to say that the case was submitted to the jury in substantial conformity with the views expressed in this opinion, and that the judgment must be affirmed.

Wytheville.

LOGAN v. PANNILL.

JUNE 15th, 1893.

1. JUDGMENTS—*Lands in another County—Purchasers.*—Purchaser of land under decree in county wherein it lies, is not affected by constructive notice of judgment in another county which is not docketed in former county until after sale is confirmed and purchase-money paid, though title is retained.
2. *IDEM—Assignees.*—Judgment not docketed in county wherein land of the debtor lies, and is sold under decree in partition, does not, upon being docketed in said county, become a lien upon bonds for the purchase-money in hands of assignee who has no notice of the judgment, though title to the land was retained, and those bonds being personalty, and no execution had been issued.

Argued at Richmond. Decided at Wytheville.

Appeal from decree of circuit court of Pittsylvania county rendered June 20, 1890, in the chancery suit of N. T. Green, administrator of William Logan, deceased, complainant, against A. S. Pannill, James B. Pannill, John T. Pannill, Ruth H. Gordon, and others, defendants. Opinion states the case.

N. T. and Berryman Green, for appellant.

Christian & Christian and Withers & Barksdale, for appellees.

FAUNTLEROY, J., delivered the opinion of the court.

The record discloses the following case: In 1885, a suit was instituted in the circuit court of Campbell county, styled

Opinion.

"Ficklin v. Pannill," for the partition of a valuable tract of land, situated in said Campbell county, among the ten children of Maria B. Pannill. On the 29th of October, 1885, a decree was entered in the said cause for the sale of the said land, and appointing commissioners to make the said sale. D. H. Pannill qualified as commissioner and acted under the said decree, and in May, 1887, he sold the said tract of land to Mrs. Ruth H. Gordon for the sum of \$10,000; of which \$150 was payable and paid in cash, and the balance, \$9,850, was made payable in equal instalments, at two, three, four, and five years from July 1, 1887. This \$9,850 was split up in ten bonds of \$985 each, made payable to one of the ten children entitled, so that the said bonds could be turned over to the children without waiting for their maturity or collection. The commissioner of sale reported this sale and this arrangement of distribution among the children entitled, to the circuit court of Campbell county, at its October term, 1887; and, on the 26th day of October, 1887, the said court entered a decree confirming the said report of the said commissioner and the sale therein reported; and, by its said decree, directed the said commissioner to transfer the said bonds to the said ten children, respectively, or to their assignees. Of these children there were John T. Pannill, A. S. Pannill, and James B. Pannill. On November 6, 1887, A. S. Pannill sold and assigned, for value, his land bond to John T. Pannill; and on January 11, 1888, James B. Pannill likewise sold and assigned, for value, his bond to said John T. Pannill, who promptly notified the commissioner of sale and distribution of these assignments. In March, 1888, Mrs. Ruth H. Gordon, the purchaser of the land and the prime obligor in the said bonds, paid to John T. Pannill full satisfaction and discharge of her three bonds then held by him—namely, his own bond, which he had received as one of the ten children, and the bonds which had been assigned to him, as aforesaid, by A. S. Pannill and James B. Pannill, respectively.

Opinion.

On April 30, 1887, William Logan obtained, in the circuit court of Pittsylvania county, a judgment for \$1,000 against James B. Pannill, and on May 6, 1887, he obtained a judgment for the same sum, in the same court, against A. S. Pannill, on the same joint obligation. These judgments, so obtained in Pittsylvania county, were not docketed in Campbell county, where the land bought by Mrs. Ruth H. Gordon at the judicial sale made by the circuit court of Campbell county, was situated, until December 3, 1887, after sale to Mrs. Gordon had been made, reported to the court and confirmed, and the proceeds of the sale distributed by the court among the ten children entitled. Mrs. Gordon had no notice of the existence of the said judgments when she became the purchaser of the land from the court nor when she paid off her said bonds; and John T. Pannill had no notice of the said judgments at the time he acquired the said bonds, nor when they were paid to him by Mrs. Gordon.

Logan's administrator learned, in November, 1887, that the land in Campbell county had been sold to Mrs. Gordon under decree of the circuit court of Campbell county, yet he gave no notice of his judgments to Mrs. Gordon, the purchaser of the land, nor to the commissioner of sale and distribution of the proceeds of the sale; nor did he file any petition, or notice of his judgment, in the partition suit of *Ficklin v. Pannill*, so as to protect innocent assignees from taking assignments of the bonds of A. S. Pannill and James B. Pannill, and to warn and protect the purchaser at the judicial sale, Mrs. Ruth H. Gordon, from paying her obligations, as she had the right to do, unless affected with notice. He simply entered the judgment on the lien docket December 3, 1887; and in March, 1889, after Mrs. Gordon had paid her purchase-money bonds, without any notice of his judgment, he filed an amended bill in the suit of *Logan's Administrator against Pannill* in the circuit court of Pittsylvania county, to subject the land in the hands of Mrs. Gordon to the satisfaction of his judgment.

Opinion.

The court below, by its decree under review, decided against this claim of Logan's administrator, and exonerated the land in the hands of Mrs. Gordon, the purchaser at the judicial sale made and confirmed by the circuit court of Campbell county, in the suit in said court pending, before the judgment of *Logan's Administrator against A. S. Pannill and James B. Pannill* was recorded in Campbell county, where the land is situated.

The sale to Mrs. Gordon was confirmed in October, 1887. The judgment had not then been docketed in Campbell county, and she, unaffected by, and without notice or knowledge of the existence of the judgment, paid off her obligations, as she had the right to do.

The judgment creditor knew of the pendency of the partition suit of "*Ficklin against Pannill*," and he took no step to intervene therein, or to file his judgment so as to give notice of his claim. He did not give notice of it to the commissioner of sale, nor to Mrs. Gordon, whom he knew to be the purchaser of the land, at a judicial sale regularly made, reported to the court and confirmed; but he lay by and permitted her to pay off her purchase-money obligations for the land, in full and without any knowledge of his judgment.

A purchaser of land at a judicial sale in Campbell county, under a decree of the circuit court of Campbell county, cannot be affected by constructive notice of a judgment obtained in Pittsylvania county, which is not recorded in Campbell county, where the land is situated, before the confirmation of the sale; and actual notice or knowledge of the said judgment must be brought home to the purchaser before the payment of the purchase-money.

The judgment could not be a lien upon the bonds of the purchaser in the hands of A. S. Pannill and James B. Pannill, or of their assignee, John T. Pannill, because those bonds were personalty, and not subject to the lien of any judgment where no execution was ever sued out. The mere retention

Opinion.

of title to the land by way of security for the bonds, did not alter their nature as personalty. John T. Pannill is in no way bound by or affected by the Logan judgment, and he became assignee of the bonds, for value, without any knowledge of the judgment, and they were paid to him by Mrs. Gordon, the obligor, without any knowledge or notice of either him or her. The land in the hands of Mrs. Gordon is not chargeable with the lien of the judgment which was not docketed until after the sale was confirmed, and of the existence of which, the record shows, she had no knowledge or notice until she had fully and faithfully paid her purchase-money bonds. See *Moyer v. Hinman*, 13 N. Y. (3 Kem.), 180; *Filley v. Duncan*, 93 Amer. Dec., 337, and note, pp. 354-5; 1 *Black on Judgments*, section 438; 1 *Pomeroy's Equity Jurip.*, section 368. And there is no shadow of equity against John T. Pannill.

Our judgment is to affirm the decree of the circuit court of Pittsylvania county without error.

DECREE AFFIRMED.

[See *Riley v. Martinette* (Col.) 20 Lawyer's Annotated Reports, where the subject of the extent to which purchasers at judicial sales are protected against loss by defective titles and irregularities, is fully discussed.—*Note by Reporter.*]

Wytheville.

KINSEY v. KINSEY.

JUNE 15th, 1893.

DIVORCE—Cruelty—Case at bar.—In a wife's suit for divorce *a mensa et thoro* for cruelty, it was proved that habitually defendant annoyed and mortified her, was often drunk and abused and struck her, came into her room at night with sword and pistol threatening to kill her, and finally drove her and her three-year-old child from the house at night, and that she was very delicate and nervous.

HELD:

She was entitled to the relief asked for.

Argued at Richmond. Decided at Wytheville.

Appeal from decree of circuit court of Rappahannock county, rendered 17th November, 1891, in the chancery cause wherein Addie Kinsey, by, &c., was complainant, and Thomas Kinsey was defendant.

The object of the suit is to obtain a decree of divorce, *a mensa et thoro*, of the complainant, Addie Kinsey, from her husband, Thomas F. Kinsey, the defendant, upon the ground, set forth and specially charged in the bill, of the drunken brutality and violence to the personal safety and life of the said Addie Kinsey, the destruction of her peace and the continual menace to her life, by the gross bestiality and inhuman conduct of the said Thomas F. Kinsey toward her and her infant daughter, only three years of age. The prayer of the bill is that the "said Thomas F. Kinsey be restrained and enjoined

Statement.

from interfering with or in any way molesting your oratrix and her child, now with her; that your oratrix may be divorced from the said Thomas F. Kinsey, *a mensa et thoro*; that he, at once, and pending this suit, be compelled to pay such sums of money as temporary alimony as may be sufficient for the support of your oratrix and her child, and such other sums of money as may be required to pay costs of this suit and the fees of counsel proper to be paid to carry on this suit; that he may be compelled to make such permanent provision for the support of your oratrix and her child as may be just and right, and to secure the regular, prompt, and safe payment of the same; and that all such further and general relief may be afforded to your oratrix as may be right and just in the premises, &c."

The defendant, Thomas F. Kinsey, answered the bill, and filed his cross bill, to which the complainant, Mrs. Addie Kinsey, filed her answer, and the cause coming on to be heard, the court entered the decree complained of as follows: "This cause came on to be heard upon the papers formerly read—upon the answer and cross bill of Thomas F. Kinsey, upon the answer of complainant, Mrs. Addie Kinsey, to the cross bill of the defendant, Thomas F. Kinsey; upon the depositions of witnesses for complainant and respondent, and upon exhibits and record evidence, and was argued by counsel; on consideration whereof, the court being of opinion that neither the complainant nor the respondent is entitled to the relief prayed in the bill of complaint and cross bill, respectively; and, especially, that the charge of adultery in said cross bill is entirely unsustained by the evidence—indeed without any evidence to support it, doth adjudge, order, and decree that both the bill of complaint, filed by Addie Kinsey, by her next friend, and the cross bill filed by the respondent, Thomas F. Kinsey, be dismissed at the cost of said defendant, Thomas F. Kinsey. The injunction against said Thomas F. Kinsey, by the decree of January 10, 1891, restraining him from disposing of his

real estate, be, and the same is, dissolved. It is ordered that Thomas F. Kinsey pay to E. T. Jones, receiver in this cause, the sum of \$250 as compensation to her counsel for their services in this cause, and that he have execution therefor. And it is further ordered that Thomas F. Kinsey pay all the costs of these proceedings, both upon the original and cross bill, and this decree is final, &c.

J. C. Gibson, for appellant.

John F. Rixey and *Eppa Hunton, Jr.*, for appellee.

FAUNTLEROY, J., (after stating the case) delivered the opinion of the court.

Upon the pleadings and the evidence in the record, we are of opinion that the complainant, Addie Kinsey, was entitled to a decree for a divorce, *a mensa et thoro*, and that the circuit court erred in dismissing her bill, and in not giving her the relief prayed for, in which particular and to which extent the decree appealed from is erroneous, and is annulled and reversed. But, in other particulars, being without error, it is affirmed, with costs in favor of the appellant.

The case will be remanded to the circuit court of Rappahannock county for its further action upon the case conformed to the foregoing opinion of this court.

REVERSED IN PART AND AFFIRMED IN PART.

Wytheville.

HOGAN v. TYLER, RECEIVER.

JUNE 15th, 1893.

RAILROADS—*Crossings—Contributory Negligence.*—Where a person, after standing near a railroad crossing, attempts to cross and is run over by a train, which he might see or hear if he looks or listens, is guilty of such contributory negligence as will prevent a recovery for his death, notwithstanding negligence of defendant in failing to sound the whistle or ring the bell. *Marks v. Railroad*, 88 Va., 1.

Argued at Richmond. Decided at Wytheville.

Error to judgment of corporation court of Roanoke City, rendered May 18, 1890, in an action of trespass on the case for damages for the negligent killing of plaintiff's intestate, wherein Hogan's administrator was plaintiff, and Tyler, receiver of the Shenandoah Valley Railroad Company, was defendant. Opinion states the case.

Penn & Cocke, for plaintiff in error.

Griffin & Glasgow, for defendant in error.

HINTON, J., delivered the opinion of the court.

This was an action brought to recover damages for the killing of the plaintiff's intestate by a shifting engine upon the tracks of the Shenandoah Valley Railroad Company in the city of Roanoke.

After the evidence of the plaintiff was all in, the defendant, without introducing any evidence in its own behalf, demurred to the evidence of the plaintiff. Whereupon the jury having

Opinion.

found a verdict for the plaintiff subject to the demurrer, the court, upon consideration, sustained the demurrer, and entered judgment for the defendant. The accident occurred at the intersection of a footway or crossing, made by the defendant company for the purpose of giving foot passengers access to the railroad platform, but which the public had been allowed to use, and the southern track of the defendant company. The crossing is thirty feet wide, and at its northern end there is a pair of steps which have to be descended by persons in reaching the crossing. Running across this footway are two lines of tracks, which are nine feet apart, and run east and west. Immediately preceding the accident a shifting engine with a tender attached had pushed a number of cars on the southern track some short distance (exactly how far is not shown) west of the footway, and was backing east, when, at the instant the tender reached said crossing, it struck down, ran over and killed Mrs. Hogan, the deceased.

Now, drawing all proper inferences in favor of the demurree, it may be said that it is proven that the engine was without a brake and that there was no lookout on the tender, and that in these respects the company was clearly negligent. But, admitting these things, it nevertheless as clearly appears that the deceased was grossly negligent in undertaking to cross the tracks at the time and under the circumstances she did.

She was standing, at 9 o'clock in the morning, on the steps on the north side of the track, with nothing to prevent her seeing the backing train if she had looked as she ought to have done, and with nothing to prevent her hearing if she had listened as she also ought to have done. And yet, as the evidence undoubtedly proves, she did neither. Whether, then, she was alarmed, as the plaintiff contends, by the appearance of a car standing on the northern track within ten feet of her, or was, as one of the witnesses testifies, in a hurry and anxious to cross, in either event she did exactly what it was culpable negligence in her to do—*i. e.*, threw herself directly in the

Opinion.

path of a moving train, and must, therefore, be regarded as the author of her own destruction. In this view the language of Mr. Justice Field, in *Railroad Company v. Houston*, 95 U. S. R., 702, is as applicable to this case as to that. "If," said he, "* * * the failure of the engineer to sound the whistle or to ring the bell, * * * did not relieve the deceased from the necessity of taking ordinary precautions for her safety, negligence of the company's employees in these particulars was no excuse for negligence on her part. She was bound to listen and to look, before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into a place of possible danger. Had she used her senses she could not have failed both to hear and to see the train which was coming. If she omitted to use them, and walked thoughtlessly on the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequences of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind." It is perfectly manifest that nothing that was done or omitted to be done by the defendant in this case placed the deceased in any jeopardy from which she was suddenly called upon to extricate herself, but that her death was occasioned in a legal sense by her rash conduct in rushing headlessly before a moving train.

The case is therefore clearly controlled by the case of *Marks v. Petersburg Railroad Co.*, 88 Va., 1, where the rule with regard to the duty of passengers at crossings with its exceptions is fully stated, and many of the authorities are referred to.

The result is that the action of the hustings court of Roanoke must be affirmed.

JUDGMENT AFFIRMED.

Wytheville.

STATE BANK OF VIRGINIA v. BLANCHARD AND ALS.

JUNE 15th, 1893.

1. BILL OF REVIEW—*Errors of Law—Appeal*.—If decree be erroneous in determining questions of fact, the only remedy is by appeal. Errors of law appearing on faces of decrees, orders, and proceedings arising on facts admitted by the pleadings, or stated as facts in the decree, may be corrected by bill of review. *Rawlings v. Rawlings*, 75 Va., 76.
2. PURCHASERS FOR VALUE WITHOUT NOTICE—*Code*, § 2874.—A purchaser for value of property standing in the name of a partner, without notice to purchaser of any partnership, or that the assets thereof were used in buying, or improving it, is not affected by *Code*, § 2874, relating to limited partnerships.
3. IDEM—*Latent Equity*.—It is the settled law that a *bona fide* purchaser of the legal title is not affected by any latent equity founded on a trust, fraud, or incumbrance, or otherwise, whereof he had not notice, actual or constructive. *Iron Co. v. Trout*, 83 Va., 397.

Argued at Richmond. Decided at Wytheville.

Appeal from decree of the chancery court of the city of Richmond, dismissing a bill of review in a suit in equity, wherein the State Bank of Virginia, appellant here, was plaintiff, and Paul G. Blanchard and others were defendants. Opinion states the case.

W. W. Henry and *M. M. Gilliam*, for appellant.

Coke & Pickrell, for appellees.

Opinion.

LEWIS, P., delivered the opinion of the court.

This is an appeal from a decree of the chancery court of the city of Richmond, dismissing a bill of review for alleged errors of law on the face of the record.

The suit was instituted by the State Bank of Virginia to set aside a certain deed by Silvanus C. Blanchard to Paul G. Blanchard, dated May 16, 1884, on the ground that the same was voluntary, and, therefore, void as against the creditors of the grantor. Another deed, of the same date, by the grantor, conveying a house and lot on Franklin street, in the said city, for the benefit of his daughter, Mrs. Forbes, was also assailed in the bill, on the same ground; but that is not involved in this appeal. The property conveyed by the first-mentioned deed, and which is the sole subject of controversy here, is a certain warehouse, and the lot upon which it stands, situate on Virginia street. This property, at the time of its conveyance to Paul G. Blanchard, stood on the records in the name of the grantor. The consideration expressed in the deed was forty thousand dollars, and there is no question here that the grantor was indebted to the grantee in that sum, for money previously borrowed, which debt was satisfied by the conveyance, and the evidence of it surrendered. At the time of this conveyance, the grantor, although previously a man of large wealth, was admittedly insolvent.

Several years prior to this conveyance, a limited partnership was formed between Silvanus C. Blanchard and his son, Silvanus Blanchard, to conduct a wholesale grocery business in Richmond, the latter being a general, and the former a special, partner; and both were bound for the debt of the bank.

On the 22d of May, 1884, six days after the date of the conveyance to Paul G. Blanchard, the partnership being insolvent, an assignment was made by Silvanus Blanchard, the son, of all his effects to Pickrell & Rountree, trustees, for the benefit of his creditors. The partnership was conducted under the

Opinion.

name of "S. Blanchard," and was to expire by limitation in 1886. The parties, however, mutually agreed to dissolve it on the 1st of January, 1884, and notice of dissolution was published in a newspaper, though not for the period prescribed by the statute. By the terms of the dissolution agreement, S. Blanchard purchased the interest of S. C. Blanchard, assumed the liabilities of the concern, and succeeded to the business, which he conducted on his individual account until his assignment on the 22d of May, 1884, above mentioned.

The bank, in the original bill, attacking the deed to Paul G. Blanchard, claimed as a creditor of S. C. Blanchard, and not as a creditor of the limited partnership of S. Blanchard. It also treated the warehouse property, conveyed by that deed, as the individual property of S. C. Blanchard; and the ground of attack was, not that the property had been conveyed in violation of the limited partnership statute, but that the conveyance was without valuable consideration.

An amended bill, however, was afterwards filed, in which the plaintiff claimed as a creditor of the partnership. It also alleged that the partnership had never been legally dissolved; that the property had been purchased and improved with partnership funds, and was, therefore, subject to the partnership debts, inasmuch as the grantee, Paul G. Blanchard, had notice of this equity in favor of the partnership creditors.

To this amended bill Paul G. Blanchard pleaded estoppel. He also set up in his answer the defence of a *bona fide* purchaser for valuable consideration; and both of these defences, after much evidence had been taken, were sustained by the decree which the lower court was asked to review.

Waiving consideration of the demurrer to the amended bill, and without going into the question of estoppel, about which much was said in the argument at the bar (and which arises out of the proceedings in certain suits in the United States Circuit Court, involving the property in controversy, and also that conveyed by S. Blanchard to Pickrell & Rountree, trus-

Opinion.

tees), it will be sufficient, in the view we take of the case, to rest our decision upon that branch of the decree which sustains the second defence above mentioned, viz: that of a *bona fide* purchaser. The language of the decree on this point is, that "the said Paul G. Blanchard was an innocent purchaser of said property for valuable consideration, without notice of any trust, lien, equity, or fraud whatsoever." And it was accordingly held to be unnecessary to inquire or determine whether any of the partnership assets were in fact used in the purchase or improvement of the property.

It is hardly necessary to say that, so far as this decree depends upon the proofs, it is conclusive on a bill of review; for nothing is better settled than that on a bill of review the proofs cannot be considered. If the decree be erroneous in its determination of questions of fact, the only remedy is by appeal; and the only questions open for examination on this appeal are such as were open on the bill of review. "As to errors of law," said the court, speaking by Judge Burks, in *Rawlings v. Rawlings*, 75 Va., 76, "they must be such as appear on the face of the decrees, orders, and proceedings in the cause, arising on facts either admitted by the pleadings or stated as facts in the decrees. Such errors of law may be corrected by bill of review, but if the errors complained of be *errors of judgment in the determination of facts*, such errors can be corrected only by appeal," citing, among other cases, *Putnam v. Day*, 22 Wall., 60, and *Buffington v. Harvey*, 95 U. S., 99.

The fact must, therefore, be taken as conclusively established that Paul G. Blanchard was a *bona fide* purchaser without notice as declared by the lower court; so that the case resolves itself into a simple question of law—viz., whether that fact constitutes a good defence to the claim set up in the amended bill.

It will be observed that, although the amended bill charged that Paul G. Blanchard had notice of the latent equities set up

Opinion.

therein, when he took the conveyance in question, the appellant's position now is that it is immaterial whether he had notice or not; that the conveyance was in violation of the statute relating to limited partnerships, and is, therefore, void as to the appellant. In other words, that the transaction is *malum prohibitum* and void *in toto*, regardless of the *scienter* of the purchaser.

The case is thus presented of a purchaser, living in a distant State, who, in good faith, for valuable consideration, takes a conveyance of real estate standing on the public records in the name of his grantor, without knowledge that the latter was a member of the limited partnership of S. Blanchard, or that the assets of the concern had been used in buying or improving the property, and whose title is yet assailed on the ground that the assets of the partnership had been so used. In other words, that the alleged latent equity in favor of the partnership or its creditors is, by force of the statute, superior to the legal title thus acquired.

If the statute be susceptible of such a construction, it is not only a harsh and anomalous one, but it abrogates principles, in respect to a case of this sort, which have always been regarded as fundamental. Its effect, moreover, as was justly observed at the bar, would be to make our registry acts no better than snares, and to render it unsafe to accept almost any title, however perfect on the records, lest it be afterwards overturned by the assertion of a latent equity in favor of an insolvent limited partnership.

According to the appellant's view, such an equity is of a more sacred nature than that which arises out of a breach of an *express trust*, as when the estate is conveyed by the trustee in possession to a *bona fide* purchaser; for, as Professor Minor says, when the trustee is in actual possession, and conveys the estate for a valuable consideration to a person who has no notice, actual or constructive, of the trust, the title of the purchaser will be protected as against the *cestui que trust*. 2 Min. Insts., marg. p. 202; 2 Washb. Real Prop., 177.

Opinion.

Could the legislature, then, have intended to provide a different rule in cases of this sort? We think not. The statute, now carried into section 2874 of the Code, reads as follows :

“No sale, assignment, or transfer of the property or effects of any such (limited) partnership, or of any interest therein, nor any lien or encumbrance thereon, by judgment or otherwise, shall be valid, if made or created by such partnership at a time when it has not sufficient property or effects to pay all its debts, for the purpose of giving a preference to one or more of its creditors over any other creditor, or by any partner, whether general or special, at a time when he has not sufficient property or effects to pay all his debts, or in contemplation that the partnership may not have sufficient property or effects to pay its debts, for the purpose of giving a preference over creditors of the partnership to one or more creditors, whether of his own or the partnership.”

It is true this section contains no express proviso in favor of *bona fide* purchasers, as does the statute of fraudulent conveyances, now contained in section 2458; and upon this difference in the two statutes the argument for the appellant is chiefly based. But the proviso in favor of such purchasers in the statute of fraudulent conveyances is merely declaratory of the principle upon which courts of equity act, independently of the statute. This was so expressly decided by Judge Story in *Bean v. Smith*, 2 Mason, 252, in construing the Rhode Island statute of fraudulent conveyances, which, in re-enacting the statute 13 Eliz., which has been very generally adopted in this country, omitted the proviso in favor of such purchasers. And in that case Judge Story quoted with approval the remark of Lord Chancellor Loughborough in *Jerrard v. Saunders*, that as against *bona fide* purchasers without notice, “the court would not take the least step imaginable.”

The solicitude with which courts of equity preserve the rights of such persons is well illustrated by *Carter v. Allen*, 21

Opinion.

Gratt., 241. In that case, also, stress was laid on the fact that the transaction assailed was *malum prohibitum*, but without success. There Carter, the committee of a lunatic, became, indirectly, the purchaser at a judicial sale of the real estate of his lunatic. The nominal purchaser was one Chapman, at whose direction the land was conveyed by the commissioner of the court to Carter. The latter thereupon conveyed it to a trustee to secure a debt to one Barksdale; and after the death of the lunatic the heir at law filed a bill to set aside the sale and the subsequent trust deed. The bill alleged that although the report of the commissioner stated that the purchase money had been paid by Chapman to him, and by him to Carter, yet no money was in fact paid, but that receipts were simply passed between the commissioner and Carter to conceal the fact that he was the real purchaser. And it was insisted that, being positively prohibited by special provision of the statute law from becoming the purchaser of the land of his lunatic, either directly or indirectly, the deed to Carter was void, and, consequently, that the legal title, at the death of the lunatic, descended to the plaintiff.

Now, here was a clear case, not only of a violation of the statute, but a gross fraud besides, yet the transaction was sustained on the ground that Barksdale occupied the impregnable position of a *bona fide* purchaser for valuable consideration. The court, speaking by Judge Christian, said:

“The doctrine that courts of equity will not grant relief against *bona fide* purchasers, without notice, has always been adhered to as an indispensable muniment of title. It is founded upon a general principle of public policy to protect and quiet lawful possessions and strengthen such titles. It is wholly immaterial of what nature the equity is, whether it is founded on a lien, or incumbrance, or trust, or a fraud, or any other claim, for a *bona fide* purchaser of an estate for a valuable consideration, without notice, purges away the equity from the estate,

Opinion.

in the hands of all persons who may derive title under it, with the exception of the original party." And after citing a number of cases, it was added:

"Authorities might be multiplied to any extent. It is sufficient to say that it has been the uniform course of decision in this State, as well as in other States of the Union, to hold that the *bona fide* purchaser of a legal title is not affected by any latent equity founded on a trust, fraud, or incumbrance, or otherwise, of which he had not notice, actual or constructive." See, also, *Rorer Iron Co. v. Trout*, 83 Va., 397, 414; *Brooks v. Marburry*, 11 Wheat, 78, 90.

The application of these principles is so conclusive of the present case as to preclude necessity for further discussion.

As to the next and last objection of the appellant—viz: that the decree sought to be reviewed is erroneous in overruling the plaintiff's motion for further inquiry as to whether Paul G. Blanchard took the conveyance in question with notice of the equity asserted in the amended bill, it is enough to say that no error in this particular is apparent on the face of the record, and if there was such error, it was not an error of law, and, therefore, not to be corrected by bill of review.

DECREE AFFIRMED.

Wytheville.

ISAACS, TAYLOR & WILLIAMS v. CITY OF RICHMOND.

JUNE 15th, 1893.

1. CONSTITUTIONAL LAW.—Any act whose necessary operation impairs, or tends to impair the supremacy of the Constitution, is void, no matter what may have been the purpose of the legislature in enacting it.
2. CITY COUNCIL—*Notes as Currency—Case at bar.*—Under an ordinance in 1861, city of Richmond issued notes to circulate as currency. Evidence showed that one object was to aid the rebellion.

HELD:

The notes were void.

Argued at Richmond. Decided at Wytheville.

Appeal from decree of the chancery court of the city of Richmond, rendered November 23, 1889, in a suit wherein the city was complainant, and Isaacs, Taylor & Williams and others were defendants. Opinion states the case.

F. W. Christian, Pegram & Stringfellow, and W. W. & B. T. Crump, for the appellants.

C. V. Meredith, for the appellee.

LEWIS, P., delivered the opinion of the court.

This was a suit in the chancery court of the city of Richmond, to restrain the prosecution of a number of pending actions at law against the city on certain small notes issued by

Opinion.

the city during the late civil war. These notes were all under the denomination of five dollars, and were designed to circulate as currency. Some of them were issued under an ordinance of the council, passed on the 19th of April, 1861. The others were issued under an ordinance passed on the 14th of April, 1862. The aggregate amount of both issues exceeded \$500,000.

The statute of Virginia, at the time the first notes were issued, made it a penal offence to issue such notes. Code 1860, ch. 198, §§ 16, 17, 19.

The bill, therefore, charges that the first series were void when issued, because in violation of this statute; and, moreover, that both series are void, because they were issued in aid of the rebellion. And the prayer of the bill is for an injunction, and that the notes sued on be decreed to be delivered up to be cancelled.

The defendants, appellants here, answered, insisting that the first issue was legalized by an act of the legislature, assembled at Richmond, on the 19th of March, 1862, and that the second was authorized by an act of the same legislature, passed on the 29th of the same month; and they denied that either of the issues were in aid of the rebellion.

A mass of testimony was taken, which was returned by the commissioner with his report; and when the cause came on to be finally heard, the chancellor (the late Hon. Edward H. Fitzhugh), being of opinion that the case was controlled by the principles settled by the Supreme Court of the United States in *Thomas v. City of Richmond*, 12 Wall., 349, and *Taylor v. Thomas*, 22 *Id.*, 479, granted a perpetual injunction, and ordered the notes to be delivered up to be cancelled.

In reviewing this decree, we start out with the just concession by the appellants that the notes of the first series were void in their inception, because issued in contravention of the then existing law and policy of the State. *Miller v. Ammon*, 145 U. S., 421; *Middleton v. Arnolds*, 13 Gratt., 489; *Neimeyer*

Opinion.

v. *Wright*, 75 Va., 239. It is contended, however, that they were afterwards legalized, and it is strenuously denied here, as it was in the court below, that the notes of either issue were intended or used in aid of the war. It is contended that they were issued to supply small change for the ordinary business transactions of the community, and for that purpose alone.

There is certainly nothing on the face of the ordinance under which the first notes were issued, or on the face of the act of March 19th, 1862, which, in terms, shows that either the city council or the legislature had in view an unlawful object. Nor is the general rule disputed that the legislative intent must be gathered from the language used by the legislature, and that the validity of a statute, unobjectionable on its face, cannot be made to depend upon the result of a judicial inquiry into the motives of the legislature; and yet we are not prepared to say that an exception to this rule does not obtain in a case where the question is whether a statute passed by the legislature of a *de facto* State government during the late war, was or was not in aid of the rebellion. The reasoning of the court in *Keith v. Clark*, 97 U. S., 451, would seem to favor the proposition that in such a case, when the question is properly raised on the record, extrinsic evidence is admissible to show the real object and purpose of the enactment. But it is unnecessary to decide that question, because there is another principle, thoroughly established, and which is sufficient for the purposes of the present case, and that is, that any act the necessary operation of which impairs, or tends to impair, the supremacy of the Constitution, is void, no matter what may have been the purpose of the legislature in enacting it. *Minnesota v. Barber*, 136 U. S., 313; *Brimmer v. Rebman*, 138 *Id.*, 78; *N. & W. R. R. Co. v. Commonwealth*, 88 Va., 95, 103. See, also, *Som Hing v. Crowley*, 113 U. S., 703, 710.

The case, then, may be narrowed down to this: Were the notes in question issued and used for the purpose, as charged in the bill, of aiding in subverting the Constitution or authority

Opinion.

of the United States? If they were, then it was not competent for the legislature to validate them, and the effect is the same as if they had been originally issued under a statute professedly passed as a war measure.

In *Thomas v. City of Richmond*, 12 Wall., 349, in which case the validity of the very statute we are now considering was involved, the Supreme Court said:

"We have already decided in *Texas v. White*, 7 Wall., 700, and in *Hanauer v. Doane*, 12 Wall., 342, that a contract made in aid of the rebellion is void, and cannot be enforced in the courts of this country. The same rule would apply with equal force to a law passed in aid of the rebellion. Laws made for the preservation of public order, and for the regulation of business transactions between man and man, and not to aid or promote the rebellion, though made by a mere *de facto* government not recognized by the United States, would be so far recognized as to sustain the transactions which have taken place under them. But laws made to promote and aid the rebellion can never be recognized by, or receive the sanction of, the courts of the United States as valid and binding laws."

Accordingly, it was held that the notes sued on in that case, which were a part of the first issue, above mentioned, were void, and that there could be no recovery against the city, either on the notes themselves or on a claim for money had and received. The latter proposition was affirmed on the ground that persons dealing with a municipal corporation are chargeable with notice of its powers, which are such only as are plainly and unmistakably conferred by the law-making power of the State, and that the city had no such authority to issue the notes.

It is contended, however, that the present case is not controlled by the decision in that case, because there the trial court, upon evidence, perhaps, different from that in the present case, found, as a matter of fact, that the curative statute was passed in aid of the rebellion, which finding was not open

Opinion.

to review by the Supreme Court. The case was tried in the circuit court before Chief Justice Chase, who wrote the opinion, which is reported in Chase's Decisions, 551. The evidence is not fully reported, but enough appears to show that a certain memorial adopted by the city council, and afterwards presented to the legislature, praying that the notes be legalized, was admitted in evidence, and with conclusive effect, as showing the purposes for which the notes were issued. "The circumstances," said the Chief Justice, "under which the notes were put into circulation have been fully detailed by the witnesses. There was a suspension of specie payments, and doubtless one of the objects of the emission was to provide a convenient and safe circulation of notes under five dollars, and for parts of a dollar; and this certainly might be legalized. But another, and as the evidence shows, a very leading object, was to give aid and support to the rebellion. The memorial of the city council to the legislature excludes all doubt on this point. The case," he added, "is, therefore, brought directly within the principle of the decision in *Texas v. Chiles*, and the court is obliged to hold that no recovery can be had upon the notes."

If this memorial is admissible evidence in the present case, and we think it is, it virtually ends the case. It is not merely the testimony, nor is it the personal petition, of the individual members of the council, perhaps apprehensive of indictment for a violation of law in issuing the notes, but it is an official act of equal dignity with the ordinance itself, under which the notes were issued, and to which it refers. With respect to statutes, the rule, as announced by Lord Mansfield in *Rex v. Loxdale*, 1 Burr. 445, is that where there are different statutes *in pari materia*, though made at different times, they must be construed together as one system, and as explanatory of each other; and the rule is no less applicable to ordinances and resolutions of corporate bodies. It is to be remembered, moreover, that when the memorial was adopted, the notes were

Opinion.

confessedly void, and that the object of the memorial was, not to undo what the council had done, but to have its action legalized, as well in the interest of the note-holders as of the city.

Nor do we perceive any reason why the testimony of individual members of the council is not admissible for the same purpose. At all events, it was not objected to in the court below, and we must consider the case upon the record as it is.

In *Keith v. Clark*, already referred to, certain war issues of the Bank of Tennessee, which belonged to the State, were sustained, because there was no allegation or proof that the notes were issued for an unlawful purpose. It was said, however, that if they were, in fact, issued in violation of Federal authority, nothing could be easier than to plead and prove it. And in *City of Lynchburg v. Slaughter*, 75 Va., 57, extrinsic evidence was admitted to show the object for which certain bonds were issued by the city, under an ordinance of the council, which evidence was considered by this court, though held not sufficient to prove that the bonds were issued in aid of the rebellion.

This being so, the conclusion is irresistible that the decree of the chancery court is right.

If the evidence showed that the notes were issued and used merely to supply small change for ordinary business purposes, the case would not essentially differ in principle from *Keith v. Clark*. But it does not show this. On the contrary, it shows that while this was one reason for issuing them, another was to prepare, in the first instance, for the war then imminent, and, in the second, to meet the extraordinary expenses incident to the war after it had commenced.

The testimony of Mr. Grattan, a member of the council, and chairman of the finance committee, is very strong on this point. Speaking of the first issue, he says: "We had two objects in view. One was to provide a small currency for change, which was greatly needed; but the principal object was to

Opinion.

meet the expenses which were expected to arise out of the war"; and of the second he says: "The *only* object was to meet the expenses occasioned by the war." He then mentions, as a few of the expenses designed to be provided for, the arming and clothing of the volunteer companies of the city, the purchase of a house for the president of the Confederacy, and the building of fortifications around the city. He also says the last issue "was eagerly sought after by commissaries in the army for change, who took up the notes as fast as they could be issued."

Mr. Scott, another member of the council, testifies to the same effect, and adds: "The finances of the city required the issue of these notes, or a tax bill, which would have been too burdensome for the then condition of the people, and too dilatory in its operation."

On the other hand, two members of the council testify, as witnesses for the defendants, that the only object in issuing the notes, so far as they knew or heard, was to provide small change. But the memory of one of these witnesses, at least, is at fault; for it was on his motion that the memorial to the legislature was adopted, and which, for aught the record shows, was unanimously adopted. And as early as January, 1861, the same member offered a resolution in the council, which was afterwards passed, to sell \$50,000 of city bonds to arm and equip volunteer companies. Nothing, however, was done under the resolution, as the scheme of raising money by issuing currency notes seemed preferable.

On the 4th of November, 1861, a few days before the adoption of the memorial, the president of the council submitted a report, showing that out of the proceeds of the notes theretofore issued the sum of \$181,231 33 had been used for war purposes. Among these expenditures were the following—viz: \$100,000 for volunteers in the Confederate service; \$15,000 for defences around the city; about the same amount paid on account of a house and furniture for Mr. Davis; \$50,000 invested

Opinion.

in Confederate bonds; and expenditures of a similar nature, aggregating several hundred thousand dollars, were subsequently made during the war out of the proceeds of notes of both issues.

It is true the notes or their proceeds were not specially set apart as a war fund, but, like the ordinary revenues of the city, were indiscriminately used in paying the expenses of the city, both ordinary and extraordinary. But we are unable to see that that affects the case, if one of the objects in issuing the notes was to aid or promote the war.

The memorial was adopted on the 11th of November, 1861. It begins by stating that owing to the suspension of specie payments, and the political changes that had taken place, the council had been compelled to take measures "for the relief of the people, and the defense of the country against the threatened war by the United States." It then refers to the statute prohibiting municipal corporations from issuing notes to circulate as currency, and proceeds as follows:

"It seemed to the council that this law, however wise and politic when the country was at peace, ought not to be permitted to stand in the way of providing the resources which were necessary to protect our homes and defend our liberties against our ruthless and unscrupulous enemies. The council, therefore, after consulting with the governor, and obtaining his approval of the measure, determined to issue \$300,000 of the notes of the city of the denominations of one and two dollars and of fifty cents."

It then goes on to show how the expenses of the city had been increased by the war, to state the expenditures that had been made in support of the war, and prays that the notes be legalized.

The ordinance under which the notes were issued was passed on the 19th of April, 1861. This, although two days after the passage of the ordinance of secession, was yet before the war is considered to have actually begun, which, in Virginia, was

Opinion.

not until the 27th of the same month. *The Protector*, 12 Wall., 700. The point is, therefore, made that the city ordinance was, at most, merely anticipatory of the war, and not in aid of the war. But there is nothing in this position, for the notes were not, in fact, issued until after the commencement of the war, and were then used, as it was contemplated they would be used, in aid of the war.

As to the act of March 29, 1862, under which the notes of the second series were issued, little need be said. This act shows on its face (and was, therefore, notice to all the world) that it was largely intended as a war measure, and was consequently void; for after authorizing the city of Richmond to issue its small notes to an amount not exceeding \$500,000, it contains a general provision authorizing all the cities and counties of the commonwealth "to issue as currency notes or bills under the denomination of one dollar in sums equal to the amounts they may have actually appropriated *for arming and equipping their volunteers and supporting the families of those who are indigent and in service.*" This language, considered with reference to the then condition of the country, and the necessary operation of the act, leaves no room for doubt that the enactment was void *in toto*.

The appellants, therefore, are not entitled to the protection which the law throws around the innocent holder of commercial paper; nor is such a defence set up in the answers, the claim being made for the first time in the petition for appeal. "Authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder"; and without such authority there can be no estoppel. *Marsh v. Fulton county*, 10 Wall., 676; *Burch's ex'or v. Flucanna county*, 86 Va., 452; *Merrill v. Monticello*, 138 U. S., 673. In the present case, not only was the requisite authority to contract wanting, but the holders of the first notes presumably took them with knowledge of the law, which prohibited their issuance, and they have never been validated. In like manner the purchasers of

Opinion.

the notes of the second series were notified of their illegal character by the terms of the act itself, under which they were issued; so that in this particular the case is analogous to *Taylor v. Thomas*, 22 Wall., 479.

The case of the *City of Lynchburg v. Slaughter*, 75 Va., 57, is not in point. There the question was as to the validity of certain negotiable bonds issued by the city in 1864. The city was authorized by its charter to issue such bonds, and there was nothing on the face of the ordinance under which the bonds were issued to show any illegal purpose in issuing them. The defence was that the bonds were issued in aid of the rebellion; but this court held that the defence was not sustained by the evidence, and that was decisive of the case. The court, however, added the remark that, independently of this, the defence could not avail unless the plaintiff had notice of the alleged illegal purpose.

Whether the latter view is reconcilable with the decisions of the Supreme Court of the United States, one of which is *Thomas v. City of Richmond*, holding that any contract in aid of the rebellion is void, and cannot be enforced in the courts of this country, we need not stop to inquire, since here the holders of the notes took them, in contemplation of law, with notice of their invalidity.

DECREE AFFIRMED.

Wytheville.

TAYLOR v. CUSSEN.

JUNE 15th, 1893.

1. **MARRIED WOMEN**—*Trust deed—Separate estate.*—A deed of trust executed by a married woman and her trustee on her equitable separate estate in land, her husband not joining in the deed, is void.
2. **IDEM**—*Rents and profits.*—Such trust deed is not an incumbrance on the rents and profits of such estate where it does not appear that the loan secured by the deed was for her benefit, and where her intention was to create a *specific lien* on the estate.
3. **HUSBAND**—*Estoppel.*—Where husband was not guilty of any fraud, actual or constructive, in negotiating the loan, he is not estopped from denying the validity of such deed.

Argued at Richmond. Decided at Wytheville.

Appeal from decree from the chancery court of the city of Richmond, rendered May 10, 1892, in a suit in equity wherein William J. Cussen was plaintiff and William G. Taylor and others were defendants. Opinion states the case.

F. M. Connor and *B. T. Barrett*, for appellants.

Meredith & Cocke and *Jackson Guy*, for appellee.

LEWIS, P., delivered the opinion of the court.

By deed bearing date September 7, 1869, one Walthall conveyed, for valuable consideration, to John C. Gibson, trus-

Opinion.

tee for Ophelia V. Cussen, a married woman, three unimproved lots situate in that part of Richmond known as Fulton. This deed was recorded in 1871. On the 27th of June, 1873, William J. Cussen, the husband of the said Ophelia, negotiated a loan for \$4,800 with the Dollar Savings Bank, for which sundry notes were executed by Gibson, trustee, payable to his own order, and endorsed by him; and on the same day Gibson and Mrs. Cussen (without the concurrence of her husband) executed a deed of trust on the lots to secure these notes.

In February, 1875, several of the notes being due and unpaid, the trustees in the deed of trust advertised the lots for sale, whereupon Mrs. Cussen, suing by her next friend, David Parr, filed her bill for an injunction, alleging that the deed of trust was void, and an injunction was awarded. Afterwards the trustees of the bank, who were also made defendants, answered the bill, averring that the lots in question were in reality the property of the said W. J. Cussen, and that the conveyance had been taken in the name of Gibson, trustee, as a cloak to protect them from the claims of his (Cussen's) creditors. It was also averred, but of this there was no proof, that the money loaned by the bank had been used in improving the property.

On the 13th of November, 1884, the lots were conveyed by Gibson and Mr. and Mrs. Cussen to one Schwartz, who, on the same day, conveyed them to Cussen, the consideration expressed in both deeds being five dollars. Some time afterwards Mrs. Cussen died, and the suit was revived in the name of William J. Cussen as sole plaintiff.

Under a subsequent decree, the cause was referred to a commissioner for certain inquiries, who reported (1) that Mrs. Cussen took under the deed of September 7, 1869, an equitable estate; (2) that the deed of trust of the 27th of June, 1873, was void; *but* (3) that W. J. Cussen was estopped by his conduct to deny its validity. This report was confirmed, except in the latter particular, and a perpetual injunction granted by the decree complained of.

We are of opinion that there is no error in the decree. Assuming, for the purposes of the present case, that Mrs. Cussen took under the deed of September 7, 1869, a separate equitable estate, as contended for by the appellants, it is clear that the deed of trust is void.

The doctrine is well established in Virginia that a married woman, having an equitable separate estate in land, can dispose of the *corpus* only by will or by deed with the concurrence of her husband (*i. e.*, in the mode prescribed by the statute for the alienation of real estate by a married woman), unless the instrument creating the estate otherwise provides. This has been so often decided as to be no longer an open question in this court. *McChesney v. Brown*, 25 Gratt., 393; *Christian & Gunn v. Keene*, 80 Va., 369, and cases cited.

In the present case the instrument creating the estate neither prescribes a mode of alienation nor imposes any restriction upon the power of alienation; so that the deed of trust, executed, as it was, by Mrs. Cussen without the concurrence of her husband, was without any legal effect whatever, so far as she was concerned, and so far as the trustee who united in it is concerned, it was *ultra vires* and void. *Green v. Claiborne*, 83 Va., 386.

It is contended, however, that the deed, though void as an alienation of the *corpus* of the trust estate, must be treated as an incumbrance on the rents and profits. But there is no authority for such a position. The decisions of this and other courts in which the general engagements of a married woman have been held a charge on her separate equitable estate (*i. e.*, the personalty and the rents and profits of the real estate) proceed on the ground of a presumed intention on her part to make the estate so liable. But no such general intention can be implied in the present case, because the notes which were intended to be secured by the deed of trust were not signed by Mrs. Cussen, nor does it appear that the loan was for her benefit, and it is clear, besides, that her sole object in execu-

Opinion.

ting the deed was to create a *specific lien* on the estate for the payment of the notes. *Frank & Adler v. Liliensfield*, 33 Gratt., 377, 399; *Geiger v. Blackley*, 86 Va., 328.

The only remaining question, then, is whether W. J. Cussen (who is now, as we have said, the owner of the property) is estopped to deny the validity of the deed.

"In all this class of cases," says Judge Story, "the doctrine proceeds upon the ground of constructive fraud, or of gross negligence, which in effect implies fraud. And, therefore, where the circumstances of the case repel any such inference, although there may be some degree of negligence, yet courts of equity will not grant relief. It has, accordingly, been laid down by a very learned judge, that the cases on this subject go to this result only, that there must be positive fraud, or concealment, or negligence, so gross as to amount to constructive fraud." 1 Story Eq., § 391. And as fraud is not presumed, but when charged must be strictly proven, the authorities uniformly hold that the evidence to establish an estoppel by conduct must be clear, precise, and unequivocal. Indeed, certainty is essential to all estoppels. *Bolling v. Mayor of Petersburg*, 3 Rand., 563, 576.

Bigelow lays it down, on the authority of numerous adjudged cases, that the following elements must be present in order to an estoppel by conduct, viz: 1. There must have been a false representation or concealment of a material fact. 2. The representation must have been made with knowledge of the facts. 3. The party to whom it was made must have been ignorant of the truth of the matter. 4. It must have been made with the intention that the other party should act upon it; and 5. The other party must have been induced to act upon it. Bigelow, *Estop.* (3d ed.), 484. And the same author says further (at p. 490) that the misrepresentation must be plain, not doubtful, or matter of mere inference or non-expert opinion.

These principles were recognized by the Supreme Court of the United States in *Brant v. Va. Coal & Iron Co.*, 93 U. S.,

Opinion.

326, where it was said to be essential to the application of the principle of equitable estoppel with respect to the title of real estate that "the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself, not only destitute of knowledge of the state of the title, but also of any convenient and available means of acquiring such knowledge," and that "where the condition of the title is known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." See, also, *Hill v. Epley*, 31 Pa. St., 331; *Kingman v. Graham*, 51 Wis., 232; *Bales v. Perry*, 51 Mo., 449.

Tested by these familiar principles, the decree granting the prayer of the bill is clearly right. There is no proof of any false representation or concealment on the part of the appellee when the loan in question was effected, nor is any one of the essential elements of estoppel established by the evidence.

Much was said in the argument at the bar as to the alleged fraud of the appellee in having the property conveyed, in the first instance, to a trustee for the purpose of protecting it from the claims of creditors. But as to this charge, it is enough to say that the commissioner, to whom the cause was referred, reported that the property was paid for by Gibson with money held by him as trustee for Mrs. Cussen, and there having been no exception to the report on that ground, the finding of the commissioner is conclusive here. *Simmons v. Simmons*, 33 Gratt., 451; *Cralle v. Cralle*, 84 Va., 198.

Moreover, the deed to Gibson was duly recorded several years before the loan, for which the deed of trust was given, was negotiated, and the bank was presumably acquainted at the time with the condition of the title. It appears that on several prior occasions it loaned money on the trustee's notes, taking as security, in each instance, a deed of trust on the lots, executed by the trustee alone. This money, it seems, was used by the appellee in improving the property, and was afterwards paid back to the bank by him out of his own means.

Opinion.

For what purpose, however, the loan in question was effected, or how the money was used, does not appear. In the language of the commissioner's report, "the trust deed does not show on its face for what purpose the notes were executed, nor do the notes themselves show it, nor does the testimony throw any light on the subject." All that is shown is that the loan was negotiated by Cussen; but what took place between the parties at the time does not appear. It is quite probable, especially in view of the previous course of dealing between the parties, that the deed of trust was considered by the bank a valid security for the loan, and, therefore, that Cussen was not required to unite in it. At all events, the record is destitute of any evidence which brings the case within the principles above stated.

The case, in short, as shown by the record, is simply this: That a loan was negotiated by Cussen, for which the trustee's notes were given, which were intended to be secured by the deed of trust; but that he made any representations as to the title, which was a matter of record, or that he even expressed an opinion, or supposed, that his uniting in the deed was essential to its validity, or that he offered, or was expected, to unite in it, or was guilty of deception or wrong-doing of any sort, to the injury of the bank, does not appear. As to all these matters the record is silent; and as the *onus* was upon the appellants to establish the alleged estoppel, it follows that the decree must be affirmed.

DECREE AFFIRMED.

Wytheville.

WARING v. BETTS.

JUNE 15th, 1893.

1. NEGOTIABLE INSTRUMENTS—*Presentment and demand*.—A note payable at a bank is sufficiently presented to the endorser and last manager of the bank, at his residence after 5 P. M., where the bank has ceased to exist.
2. *IDEM*—*Exhibition waived*.—If on demand of payment of such note, exhibition thereof is not asked for, and the person of whom demand is made, declines on other grounds, formal presentment by actual exhibition is waived.

Argued at Richmond. Decided at Wytheville.

Error to judgment of corporation court of Danville, rendered 6th October, 1892.

This action was debt on a negotiable note for \$500 against J. L. Waring, W. L. Waring, Jr., and I. D. Blair, maker and indorsers of the said note, by E. Betts, the owner of the same. The note was negotiable and payable at the Business Men's Bank, of Richmond, Va., a young concern at the date of the execution of the note, but it went out of existence, ceased to do business, and distributed its assets before the maturity of the note.

At the time of the maturity of the note it was not paid, and the action was instituted against maker and indorsers of the same as stated.

The defence was by demurrer, and by plea of *nil debet*, and the defence is by the indorsers that the note was not presented for payment nor duly protested, and that they are not bound.

Statement.

The case was tried by a jury and a special verdict rendered, which is as follows:

We, the jury, sworn to speak the truth upon the issue joined, upon our oath say that the defendant, J. L. Waring, executed a note in writing in words and figures—to wit:

[Note of defendants.]

DANVILLE, VA., APRIL 26th, 1892.

\$500.

Four months after date I promise to pay to the order of myself, with interest, until paid, five hundred dollars, for value received, negotiable and payable, without offset, at the Business Men's Bank, of Richmond, Va., and we, the makers and indorsers of this note, hereby severally waive the benefit of our homestead exemption as to this debt.

J. L. WARING.

No. —, Due 26–29 Aug.

[Indorsers of note.]

And other defendants indorsed said note, "J. L. Waring, Jr., J. D. Blair;" that said note was held by W. S. Patton, Sons & Co., bankers, in Danville, on the 29th August, 1892, in their possession, in Danville; that said W. S. Patton, Sons & Co. sent the following telegram:

[Telegram of W. S. Patton, Sons & Co. to notary.]

DANVILLE, VA., Aug. 29th, 1892.

To J. F. Glenn, Cashier Merchants' National Bank, Richmond, Va.:

We have failed to forward for collection note of J. L. Waring to his order, indorsed by him, W. L. Waring, Jr., and J. D. Blair, dated 26th April, 1892, payable four months, at Business

Statement.

Men's Bank, Richmond, Va., for five hundred dollars. Will send it to you by messenger to-day. In meantime demand payment of it in bank hours, and, if not paid, have it protested to-day. Protect us.

W. S. PATTON, SONS & CO.

Which was received by John F. Glenn, cashier of Merchants' National Bank, Richmond, Va., (one of the witnesses of Richmond) between 1 and 2 P. M. on 29th August, 1892; that said John F. Glenn, as a notary public for the city of Richmond, made a demand on W. L. Waring, Jr., one of the defendants, showing him said writing describing said note, at room 5, Hanewinkel Building, at 2:30 P. M. on the 29th August, 1892, for the payment of said note, and he declined to pay it, and said W. L. Waring, Jr., said that he was not authorized to represent said Business Men's Bank; that the funds of the bank had all been distributed; that there were no assets of the bank in his hands; that the only place of business the said Business Men's Bank had on the 29th August, 1892, was at No. 5 Hanewinkel Building, Richmond, Va.; that W. L. Waring, Jr., was the principal manager of said Business Men's Bank affairs on the 29th August, 1892; that previous to the 29th August, 1892, the Business Men's Protective Union, under whose charter the Business Men's Bank was doing business, had determined to cease to do banking business, and had distributed its assets; that at or subsequent hour on the 29th August, 1892, at 5:30 P. M., said John F. Glenn went to the said office of W. L. Waring, Jr., No. 5 Hanewinkel Building, with the said note in his possession, which had been brought to him by W. F. Patton, one of the firm of W. S. Patton, Sons & Co., after 5 P. M., on August 22, 1892, to demand payment of said note, and not finding said W. L. Waring, Jr., in at that time, went immediately to the home of said W. L. Waring, Jr., to demand payment, but did not find him at his residence, whereupon said John F. Glenn, as notary public, protested said

Statement.

note, and gave legal notice of protest, as set out in the following protest :

[Protest.]

VIRGINIA—CITY OF RICHMOND—TO WIT :

Know all men by these presents, that I, John F. Glenn, a notary public in and for the city aforesaid, duly commissioned and qualified, at the request of the cashier of the Merchants' National Bank, of Richmond, on the 29th day of August, in the year of our Lord, 1892, presented the note, a copy of which is the reverse of this written at the place of business, and, also, at the residence of W. L. Waring, Jr., former vice-president of the Business Men's Bank, at which bank said note is payable, the said Business Men's Bank being no longer in existence, and not having an office or other place of business, and demanded payment of the same, the period limited having expired. I also made diligent search and inquiry in order to demand payment of the maker, but was not able to find that the said maker or said note, he being a non-resident, had no office or place of business in the city aforesaid. Wherefore I, the said notary, do hereby protest the said note, as well against the indorsers as against the maker aforesaid, and all others whom it did and may concern, for all loss, damages, principal, interest, costs, and charges sustained, or to be sustained, by reason of the non-payment aforesaid, and I, thereupon, on the same day, addressed written notices to the indorsers of the said note, informing them of the demand, non-payment, and protest and dishonor thereof, and that the holders look to them for its payment, and directed one to each indorser at his postoffice address as follows :

W. L. Waring, Jr., City of Richmond.

J. D. Blair, Danville, Virginia.

Paid postage and deposited them in the postoffice in this city, to be forwarded by first mail.

VOL. xc—7

Statement.

In testimony of all which I have hereunto subscribed my name and affixed my notarial seal at the city of Richmond aforesaid, the day and year aforesaid.

J. F. GLENN,

Notary Public. Richmond, Va.

Notarial charges, \$3.

That no part of said note and costs of protest has been paid; that at the time said John F. Glenn demanded payment of said note at 2:30 P. M. August 29th, 1892, W. L. Waring, Jr., did not demand the production of the note sued on in this suit; that J. L. Waring and J. D. Blair resided in Danville on the 29th August, 1892, and neither had a place of business in Richmond, Va., but whether or not, upon the whole matter aforesaid, the issue joined be for the plaintiff or for the defendant, we, the jury, do not know, and, therefore, we pray the advice of the court, and if, upon the whole matter, it shall seem to the court that the issue is for the plaintiff upon said issue, and, in that case, we assess the damages of the plaintiff \$503, with interest thereon from 29th August, 1892. But if, upon the whole matter aforesaid, it shall seem to the court that the issue is for the defendant, then we, the jury, find for the defendants, W. L. Waring and J. D. Blair, upon the said issue; that the business hours of the banks in Richmond were from 9 A. M. to 3 P. M., though it is the custom in Richmond to demand payment after 3 P. M.

H. A. COBB, Foreman.

Whereupon it appearing to the court that the law was for the plaintiff, judgment was rendered for the plaintiff, against the defendant in the sum of \$503, with interest from the 29th day of August, 1892, as by the jury in their verdict ascertained. Whereupon the plaintiff applied for and obtained a writ of error to this court.

Berkeley & Harrison, for plaintiffs in error.

Opinion.

E. E. Bouldin, for defendant in error.

LACY, J., (after stating the case) delivered the opinion of the court.

The first question arising here is that raised by the demurrer. The declaration states a good case, and sets forth that on its due day it was duly presented for payment of the sum of money therein specified, required, payment refused, and that it was duly protested, &c.

And the defendants' demurrer to the plaintiff's declaration was properly overruled.

The claim of the defendants is that there was no presentment of the note, because when payment was demanded of the indorser, W. L. Waring, Jr., manager of the late Business Men's Bank, Mr. Glenn did not have the note in his possession, and could not have presented it, but as has been seen from the facts found by the jury, payment was refused by Waring, and the note not asked for, but payment refused, and the statement made that he was not authorized to represent the bank which had ceased to do business and had distributed its assets.

Presentment of the bill or note and demand of payment should be made by an actual exhibition of the instrument itself; or at least the demand of payment should be accompanied by some clear indication that the instrument is at hand ready to be delivered, and such must really be the case. This is requisite in order that the drawer or acceptor may be able to judge (1) of the genuineness of the instrument; (2) of the right of the holder to receive payment; and (3) that he may immediately reclaim possession of, upon paying the amount. If, on demand of payment the exhibition of the instrument is not asked for, and the party of whom demand is made decline on other grounds, a formal presentment by actual exhibition of the paper is considered as waived. Dan. on Neg. Inst., p. 485, § 654, citing *Lockwood v. Crawford*, 18 Conn., 361, and *Fall River Union Bank v. Willard*, 5 Metcalf, 216.

All the parties subsequent to the principal payer are bound only as his guarantors, and promise to pay only on condition that a proper demand of payment be made, and due notice be given to them in case the note or bill is dishonored. And we repeat this as one of the fundamental principles of the law of negotiable paper; and the infrequency and the character of the circumstances which will excuse the holder from making this demand, and still preserve to him all his rights as effectually as if it were made, will illustrate the stringency of the rule itself. Parsons on notes and bills, Vol. I., 442. The question of excuse, then, will depend upon whether due diligence has been used, and presents the ordinary inquiry as to negligence. The principal excuses resolve themselves into two classes—

First. The impossibility of demand.

Second. The acts, words, or position of a party, proving that he had no right, or waived all right to the demand of the waiver of which he would avail himself.

That impossibility should excuse non-demand is obvious, for the law compels no one to do what he cannot perform. But it must be actual and not merely hypothetical; and though it need not be absolute, no slight difficulty will have this effect. *Id.*

The circumstances which will excuse a demand are such generally as apply to a failure to present and demand payment within the required time, not absolutely. Parsons, 444, 445.

In this case the presentment of the note was not made at bank within the usual bank hours, with the note in possession, but as we have seen, this was excused in this case (1) by the fact that there was no bank to present it at, and (2) because payment was refused upon the ground that the bank had ceased to do business, and its assets distributed, and the note was not asked for, nor required, payment being refused on other grounds, the right to have it produced must be considered as waived.

The note, however, was carried, during the day, to the place of business of the late manager of the bank, and the indorser

Opinion.

sought to be charged, and this being closed, it was carried to his residence, and that being also closed, it could not be presented to him, and although it was not in banking hours, it was during the day time and before the hours of rest.

When the note is payable at a bank, it is to be presented during banking hours; and the payer is allowed until the expiration of banking hours for payment. But when not to be made at bank, but to an individual, presentment may be made at any reasonable time during the day during what are termed business hours, which, it is held, range through the whole day to the hours of rest in the evening. *Parsons*, 447, citing *Cayuga County Bank v. Hune*, 2 Hill, 635; *Nelson v. Fotherall*, 7 Leigh, 194.

And in the case of *Fainsworth v. Allen*, 4 Gray, 453, a presentment made at 9 P. M. at the maker's residence, ten miles from Boston, when he and his family had retired, was held sufficient.

And in *Barclay v. Bailey*, 2 Camp., 527, Lord Ellenborough sustained a presentment made as late as 8 P. M. at the house of a trader.

It is only when presentment is at the residence that the time is extended into the hours of rest. If it is at the place of business, it must be during such hours when such places are customarily open, or, at least, while some one is there competent to give an answer. *Parsons*, 448.

In this case there was no presentment to the maker, who could not be found, which, however, was unnecessary under section 2842 of the Code of Virginia. The protest was in due form, and duly protested, which was authorized by section 2849 of the Code, although the said note was payable at a bank in this State. And under section 2850 is *prima facie* proof of the facts stated therein, and are substantially in accordance with the finding of the jury. It therefore appears that such presentment as was requisite was made to the indorser and late manager of the bank, and that it was impossible

Opinion.

to present the same at the bank named therein, as it had ceased to exist. We must, therefore, conclude that there has been sufficient diligence on the part of the plaintiff, and that the judgment of the court below in his favor was right, and should be affirmed.

JUDGMENT AFFIRMED.

Wytheville.

BURROUGHS v. TAYLOR.

JUNE 15th, 1893.

Absent, Lacy, J.

PROHIBITION—*Justices—New Trial.*—A writ of prohibition will be granted to restrain a justice from allowing a new trial after more than thirty days after judgment, and to restrain defendant from proceeding after such new trial is allowed.

Argued at Richmond. Decided at Wytheville.

Error to judgment of the judge of the circuit court of Mathews county, rendered in vacation, December 5, 1891, on petition of Charles F. Taylor and Richard M. Taylor, partners in the name of Charles F. Taylor & Co., against George W. Burroughs and Lemuel James, for a writ of prohibition.

J. N. Stubbs, for plaintiffs in error.

John Donovan, and *Cardwell & Cardwell*, for defendants in error.

FAUNTLEROY, J., delivered the opinion of the court.

The record discloses that Charles F. Taylor & Co. brought a warrant before Lemuel James, a justice of the peace of Mathews county, Virginia, against the appellant, George W. Bur-

Opinion.

roughs, for the sum of \$71 90, with interest thereon from 11th day of July, 1890, which said warrant was tried and judgment rendered by the said justice, on the 3d day of October, 1891, against the said George W. Burroughs, in favor of the said Charles F. Taylor & Co., for \$71 90, with interest thereon from the 11th day of July, 1890, and the costs.

On the 17th of October, 1891, notice of a motion for a new trial, to be made on the 9th day of November, 1891, was acknowledged by counsel for the plaintiff; and on the said 9th day of November, 1891, a new trial was granted by the said justice.

More than thirty days having elapsed from the date of the rendition of the judgment, the justice had no jurisdiction to award a new trial (section 2946, Code of 1887); and the justice being without jurisdiction in the case, he was properly restrained by the order of prohibition issued by the judge of the circuit court of Mathews county complained of. *Hogan v. Guigon, Judge*, 29 Gratt.: "The writ of prohibition lies to restrain an inferior court from acting in a matter of which it has no jurisdiction." (88 Va., 508.)

Our judgment is to affirm the action of the judge of the circuit court of Mathews county complained of.

JUDGMENT AFFIRMED.

Wytheville.

SAUNDERS v. SMITH.

PEEBLES v. WATTS' HEIRS & AL.

JUNE 22d, 1893.

CHANCERY PRACTICE—*Joinder of Suits*.—A decree that land of a decedent is assets for the payment of the debts and of a deed of trust thereon duly executed and recorded, is proper in a suit to enforce the lien of the deed of trust, where the plaintiff, in another suit tried with it, fails to prove his title thereto claimed on the ground that he had paid for it in the decedent's lifetime, but had not received a conveyance of it.

Argued at Richmond. Decided at Wytheville.

Appeal from two decrees of circuit court of Nelson county, rendered at the March and September terms thereof, in 1890, in two united causes therein pending, styled "A. P. Saunders v. Alexander Smith, etc.," and "J. R. Peebles v. B. B. Watts' heirs, etc." Opinion states the case.

Caskie & Coleman, for appellants.*S. B. Whitehear*, for appellees.

FAUNTLEROY, J., delivered the opinion of the court.

The first mentioned of the said causes was instituted by the said A. P. Saunders against the heirs of B. B. Watts, deceased,

Opinion.

to enforce the alleged title of the said A. P. Saunders to a certain tract of land in Nelson county, Virginia, which he alleged he had bought from the said Watts and paid for in the lifetime of said Watts, but which had not been conveyed to the said Saunders; and the suit of J. R. Peebles against the heirs of the said B. B. Watts, deceased, was to enforce the lien of a deed of trust upon the same tract of land, executed by said Watts in his lifetime, to secure to the said Peebles the payment of a debt due by the said Watts to the said Peebles; but subsequent to the alleged purchase of the said land by A. P. Saunders from B. B. Watts, and his full payment for and possession of the said land under and by virtue of a verbal contract of bargain and sale.

In the early part of the year 1888 B. B. Watts died, leaving an estate of small personal property and a tract of land in Nelson county, containing about eighty-six acres. He died without a will, and his administrator, Abram Smith, brought a suit in the circuit court of Nelson county to administer to his personal estate. And in that suit a decree was entered convening the creditors of the deceased, B. B. Watts; and a report was made therein by the commissioner, and confirmed by the court, showing the amount of the personal estate of the said Watts and of the debts due by him at his death. And a decree was entered in the said suit in favor of each creditor for his *pro rata* share of the assets as ascertained by the said report, which showed a large deficiency in paying the debts of the said B. B. Watts. On the 16th day of December, 1882, the said B. B. Watts executed a deed of trust, which was duly recorded on the same day, to secure to J. R. Peebles the debt, reported in said report, of \$110 75, as evidenced by bond, with interest from December 16, 1882. After the death of B. B. Watts, L. A. Saunders and A. P. Saunders, her husband, Abram Smith and Eliza J. Smith, his wife (the said L. A. Saunders and Eliza J. Smith being the children and only heirs of B. B. Watts, deceased, his wife being dead), sold the

Opinion.

said tract of eighty-six acres of land of which B. B. Watts died seized, to one Shaver Vaughan for the sum of \$700.

The bill—a creditor's bill—of J. R. Peebles avers, that he does not seek to disturb the said sale of the land to said Vaughan, but prays that the sale money due by the said Vaughan for the said land shall be decreed to pay the debt secured to him by the deed of trust aforesaid, and that the surplus be paid over to the other creditors of the said B. B. Watts, deceased.

The two causes were united and heard together by the court; and by a final decree, entered October 3, 1890, it was adjudged, ordered, and decreed that the bill of the plaintiff, A. P. Saunders, in the first named of these causes, be, and the same is hereby, dismissed. And it is further adjudged, ordered, and decreed that A. P. Saunders having wholly failed to prove his claim of having purchased and paid for the eighty-six acres of land of B. B. Watts as alleged by him; that B. B. Watts died seized and possessed of the eighty-six acre tract, and that the same is assets for the payment of his debts, and to the payment of the deed of trust of J. R. Peebles.

Upon a careful review of the evidence in the record, we concur fully with the circuit court, that A. P. Saunders has wholly failed to prove his claim of having purchased and paid for the eighty-six acre tract, and that the same is assets for the payment of the ascertained and reported debts of B. B. Watts, deceased.

There is no error in the decrees complained of, and our judgment is to affirm them.

DECREES AFFIRMED.

Wyntheville.

WOODRUM v. GROSS.

JUNE 22nd, 1893.

SALE—Breach—Verdict—Evidence—Case at bar.—Defendant agreed to pay plaintiff \$200 if he procured Spanish cigarette paper put up in reels suitable for use in defendant's machine and to buy 1,000 reels from plaintiff. He procured a sample reel of the paper, which defendant approved and ordered 500 reels like it. These plaintiff procured. Defendant refused to take them, claiming they were not like the sample. After some delay he paid the \$200. At trial of action for price of the 500 reels an expert testified that these reels were exactly like the sample. Verdict was for plaintiff.

HELD:

The verdict could not be disturbed.

Error to judgment of hustings court of Roanoke City, rendered at September term, 1891, in an action of *assumpsit*, wherein Eugene Gross was plaintiff and R. H. Woodrum was defendant. Opinion states the case.

Penn & Cocke, for plaintiff in error.

Smith & King, for defendant in error.

LACY, J., delivered the opinion of the court.

This case is briefly as follows: R. H. Woodrum, the president of the International Cigarette Machine Company, which company used in its business a machine for the manufacture of

Opinion.

cigarettes, called the Luddington machine, and being engaged in the enterprise of introducing the company's cigarettes into Mexico and Cuba, he desired to procure Spanish cigarette paper, suitable for making cigarettes, and making them in the Luddington machine, and finding it a difficult task to get cigarette paper of Spanish make put up in reels so as to be used on the said machine, the Spanish paper being generally cut into sheets, suitable for doing the work of cigarette making by hand. He procured the services of the defendant in error, Eugene Gross, to find and procure this paper for him, and agreed to pay him \$200 for doing so, and to order from him one thousand reels of this paper if suitable for his purposes. .

Paper was procured by the said defendant in error, and the \$200 paid, and five hundred reels of the paper ordered by the plaintiff in error, and procured by the said Gross. But after receiving one reel of this paper upon the payment of the \$200, neglected and finally refused to receive and pay for it, and thereupon the defendant in error instituted his suit in trespass on the case, in *assumpsit*, against the plaintiff in error. At the trial the defendant demurred to the declaration of the plaintiff, and to each count thereof, which demurrer the court overruled, and the case being tried by a jury, there was a verdict for the plaintiff, and his damages assessed at \$770 35.

Whereupon the defendant moved the court to set aside the said verdict and grant to him a new trial, but the court overruled the motion to set aside the verdict, and rendered judgment in accordance therewith. Whereupon the plaintiff in error applied for and obtained a writ of error to this court.

The first assignment of error here is the action of the court in overruling his demurrer to the declaration of the plaintiff, upon the ground that the declaration did not set forth the performance of the conditions on his part set forth in the contract.

The declaration sets forth the cause of action distinctly, and sets forth the performance on the part of the plaintiff his

Opinion.

agreement and the refusal of the defendant to receive and pay for the same, and there is no defect in said declaration nor in any count thereof, and there was no error in the action of the court in overruling the same.

The next assignment of error is the action of the court in overruling the motion of the defendant to set aside the verdict and grant to the defendant a new trial. Upon the consideration of this motion we will observe that the evidence of the plaintiff must be considered by this court upon the principles of a demurrer to the evidence, which are well understood by the profession. *Jones v. Rixey*, 79 Va., 657; *Moore v. R. & D. R. R.*, 78 Va. Rep.

The plaintiff testified as follows:

In April, 1890, I went to the place in Baltimore, where Mr. R. H. Woodrum was exhibiting his cigarette machine, and carried with me a small reel of Spanish cigarette paper, about one-third as large as the reel here exhibited, which I had obtained from Valencia, Spain. Mr. James Clark, president of a bank in Lynchburg, had informed me that Mr. R. H. Woodrum had offered a large reward for this kind of paper put up in reels. Spanish paper itself is very common, but the difficulty was to get it put up in reels, as it is always put up in sheets, and is used by hand in making cigarettes. After corresponding with a dozen or more factories, I finally found one in Valencia, Spain, that could put the paper up in reels. As soon as Mr. R. H. Woodrum saw the small reel exhibited, April, 1890, he asked me where I had gotten it from. I declined to tell him. He said, "That's the very paper we want, and have been trying to find," and if he could get it put up in reels, so as it could be used on the Luddington cigarette machine for his trade in Mexico and Cuba, he would pay him a good price for it. When I refused to give him the name of the manufacturer, we entered into the contract here exhibited.

Opinion.

[Contract.]

BALTIMORE, APRIL 3, 1890.

This agreement, made and entered into this 3d day of April, 1890, between Eugene Gross, of Baltimore, and R. H. Woodrum, of Roanoke, Va., witnesseth, that the said Eugene Gross has agreed as follows with the said Woodrum:

First. That he will undertake to get for the said Woodrum a reel of Spanish paper, such as the Spanish will accept in Mexico and Cuba, said reel to be put up as described—1½ inches wide, and cut sample and on a wheel or bound suitable for the Luddington machine.

Second. That when the paper is gotten to the satisfaction of the factories in Mexico, the said Woodrum will pay the said Gross two hundred dollars.

Third. The said Gross binds himself to get the exclusive agency from the factory who make said paper, and not to sell any paper of this kind to anyone else, only on the order of the said Woodrum.

Fourth. The said Woodrum binds himself to give the said Gross an order for (1,000) one thousand reels as soon as it is demonstrated that it is the kind of paper wanted in Mexico.

Fifth. The said Gross to furnish the said Woodrum with a sample reel as soon as possible to forward to Mexico.

Witness the following signatures and seals this 3d day of April, 1890:

R. H. WOODRUM.
EUGENE GROSS.

I then pulled off a few yards of the reel and gave the rest to Mr. R. H. Woodrum. On June the 6th, 1890, Mr. Woodrum again came to my office in Baltimore, and gave me an order for five hundred reels in the following words:

BALTIMORE, JUNE 6, 1890.

Mr. Eugene Gross:

Order for me five hundred reels of Spanish paper—1½, 1½,

Opinion.

1½— and will pay for same upon delivery if said paper is exactly like the sample you gave me of Spanish paper. Must see the paper before paying for it.

R. H. WOODRUM,
President International Cigarette Machine.

After which I at once ordered the paper from the factory, Valencia, Spain, from which I had gotten the original small sample reel. The paper cost me \$1 85 per reel, including duty. There was no agreement as to the price, but I expected to charge \$2 50 per reel and allow him 5 per cent discount for cash. The paper arrived after some delay, and on July 29, 1890, I delivered to Mr. J. W. Coon, agent for Mr. Woodrum, a sample reel of the paper, and Mr. Coon gave me the following receipt:

BALTIMORE, JULY 29, 1890.

Received from Mr. Eugene Gross a reel of Spanish paper, for which I am to pay him the sum of \$200 in ten days if the paper prove to be same as sample given to him or Mr. Woodrum.

J. W. COON,
Secretary and Treasurer.

I notified Mr. Woodrum that the five hundred reels of paper were ready for him whenever he should come and pay for them. I have never seen Mr. Woodrum from that time until to-day. He never come to get the paper. It is in my store in Baltimore now, useless to me. Mr. Woodrum can get it whenever he pays for it. I cannot sell it to any one for anything. Mr. J. W. Coon on September 4, 1890, sent me a check for \$200 in payment of reward for sample reel. This is all that has been paid me.

Witness here read in evidence nine letters written him by Mr. Woodrum and Mr. Coon.

Opinion.

ROANOKE, VA., U. S. A., JULY 22, 1890.

Eugene Gross, Esq.:

Dear Sir,—Some three or four weeks ago I was up to see you about the paper, at which time you said you thought possibly some paper was on the way. I afterwards got Mr. Coon, president of the Commercial National Bank, to go up to see you and guarantee any bill you might order for me. He told me he saw you and afterwards wrote you guaranteeing bill in all its particulars. Now I have not heard a word from you yet. Please write to me and tell me what the status of the paper question is, as I want to know. If I cannot hear something from you very soon I will have to go to Spain or Paris and see if I can get it myself. And, of course, then our contract will be at an end; and mind what I tell you, if you get the paper for any one else, I expect to hold you to your contract written to me in Baltimore. I have done everything in my power, have given you guarantee, and every bank in Baltimore could tell you by making inquiry from my bank that my contract is good.

Now, if you succeed in getting this paper for any one else and not for me, I shall sue you on contract as soon as it is done. I do not make this as a threat, but to assure you that I intend to insist on my rights under that contract. I have been relying and waiting on you to get that paper, expecting to pay you \$200 for the first reel of real Spanish paper and order all the rest of my paper through you. Now if you cannot get the paper please say so, and not keep me waiting.

Let me hear from you on receipt of this, and oblige,

Yours respectfully,

R. H. WOODRUM.

ROANOKE, VA., U. S. A., JULY 24, 1890.

Eugene Gross, Esq.:

Dear Sir,—Yours of July 23d to hand. I am glad to know you have succeeded in getting papers. I will be in Baltimore

VOL. xc—9

Opinion.

in a day or two and look at the paper, and if it is what we want, will pay you the \$200 at once.

Very respectfully,

R. H. WOODRUM.

ROANOKE, VA., U. S. A., AUGUST 15, 1890.

Eugene Gross:

Dear Sir,—Yours of August 12th to Mr. J. W. Coon, president Commercial National Bank, has been handed to me for reply. It seems like you are determined to have your money for the reel of paper before we have had a chance to ascertain whether it is the kind wanted in Mexico. Now, Mr. Gross, we are business people, and do not intend nor propose to pay for a pig in a bag. You enclosed to Mr. Coon a copy of his receipt in which he agrees to pay you \$200 in ten days if the paper proves to be the same as the sample you gave me. Now the paper has not proven to be like the sample you gave me, and as a matter of fact, I frankly say I do not think it is the thing. If you will compare the two papers you will see the difference yourself. At the same time we have sent to Mexico to see if they will adopt it: if they will adopt it, it does not make any difference to me whether it is the same or not. Mr. Cox, of Richmond, Va., who has been in Mexico, says it is not the proper paper. It is improperly cut at any rate, even if it is the same quality.

But, laying all misunderstandings aside, Mr. Coon has not signed any paper to pay you \$200 unless that paper proves to be the paper we want. That you will admit, and we are not going to take it unless it is the right kind of paper, and if the right kind of paper we expect to take it and pay you for it, and order all our paper through you. Now I ought to hear from Mexico by the 20th of this month, and hope to do so, and as soon as they decide down there that that is the paper they want you shall have your \$200.

Respectfully,

R. H. WOODRUM.

Opinion.

ROANOKE, VA., U. S. A., AUGUST 18, 1890.

Eugene Gross:

Dear Sir,—Your letter of the 16th instant, directed to Mr. Coon, was handed to me for reply. In answer I will state it does seem to me like you are in a terrible hurry for the \$200. Your \$200 is unquestionably safe if the paper is what you claim it to be, and certainly your lawyer will not advise you to draw suit until you have given us reasonable time to decide with reference to the paper. If you require us to decide immediately, I shall decide it is not the paper. If you will give us proper time to decide, it may turn out all right and to your advantage, but if you demand a decision at once, I will express the paper to you and decide of my own judgment it is not the article wanted. I have sent the paper to Mexico to a party for his opinion. If it suits him, it will suit us. My opinion is your paper is not like the reel sent us. Mr. Cox's opinion, of Richmond, who spent eighteen months in Mexico, is that it is not the paper. At the same time, I am trying to get the Mexican people to adopt it, which will answer the same purpose, and that is all we want. If you decide to sue us at once, take the letter Mr. Coon sent you, and the paper, and carry them to your lawyer, and if he is a sensible man, he will advise you to give us time. We do not propose to pay for it unless it is what we want, and your being in such a hurry to get your \$200 seems like you have your doubts yourself. You know Mr. Coon is good for anything he says, if you don't know me, and if we find out this is the paper needed, you shall have your \$200.

Yours truly,

R. H. WOODRUM.

M.

ROANOKE, VA., U. S. A., DECEMBER 1, 1890.

Mr. Eugene Gross:

Dear Sir,—Yours of the 28th ulto. to hand. Allow me to state that I regard your letter as a dirty, impertinent piece of

Opinion.

paper, and I will say to you that you will not be able to beat our company out of any more money at present.

We paid the \$200 to you, not because we were satisfied you had the paper we desired, but because you had been to some trouble and were making such a fuss about it. The paper that you have gotten is not the paper they use in Mexico, nor is it the paper I ordered. If you will read my order you will see that I stated that I would take the paper and pay for it, provided it was the paper we wanted. Now if the paper you ordered is not like the sample you sent, we do not want it. So you can make your calculations to go to court, for we will never pay you one cent outside of court. If you had been a gentleman, and possessed any business capacity, you would have given me the address of the paper people for the two hundred dollars instead of acting as you did.

Very respectfully,

R. H. WOODRUM.

ROANOKE, VA., July 4, 1890.

Eugene Gross, Esq.:

Dear Sir,—Referring to our conversation of a day or two ago about the Spanish paper that you are getting for Mr. R. H. Woodrum, president of the International Cigarette Machine Company, allow me to say this, that whenever you get the paper and deliver it to Mr. Woodrum, and it is the kind of paper he desires, I bind myself to be responsible and guarantee the payment for the paper you furnish him, together with the \$200 reward that he was to give you for getting the paper. Whenever you get the paper notify Mr. Woodrum, of this city, and he will come on and examine it, and if it is accepted by him I will pay his draft on me for the amount due you.

Very respectfully,

J. W. COON,
President Commercial National Bank.

Opinion.

ROANOKE, VA., AUGUST 7, 1890.

Mr. E. Gross:

Dear Sir,—On my return home I gave the reel of paper to Mr. Woodrum, and he thinks it will be what they want. He has sent a piece to Mexico, and as soon as he hears from it will send you my check for \$200, or return the paper. They have not heard as yet; have not had time.

Truly yours,

J. W. COON.

ROANOKE, VA., SEPTEMBER 4, 1890.

Eugene Gross, Esq.:

Dear Sir,—I have been instructed to pay you \$200. As I always told you, your money would come. The parties here was tied up by not hearing from the paper sent to Mexico. Mr. Woodrum will call and get the other and see you. You will always get what I promise you.

Thanking you for patience,

Yours truly,

J. W. COON.

ROANOKE, VA., NOVEMBER 24, 1890.

Mr. Eugene Gross:

Dear Sir,—The agreement made with you was if you could get the kind of paper they wanted they would take it. Mr. Woodrum says to me to-day that the paper reported on from Mexico is not what they want, and they cannot use it. You can dispose of it as best you can.

Truly yours,

J. W. COON.

Witness exhibited to the jury a piece of the sample reel given to Mr. Woodrum April 3, 1890, and also one of the 500 reels ordered, and testified that they were the same kind of

Opinion.

paper exactly, and were both genuine Spanish cigarette paper, and that the rest of the paper was like it, and the sample reel given Mr. Coon was also like the 500 reels.

Testimony of Maguel d'Arxe.

Maguel d'Arxe, another witness, was introduced by the defendant, and testified as follows:

"I live in Baltimore. Am a cigar manufacturer. Been there five years. Native of Cuba, and lived there until I went to Baltimore. Been in the cigar and cigarette business all my life. Am perfectly familiar with Spanish cigarette paper used in Cuba. The French use paper made of rice; the Spanish won't use that. The Spanish cigarette paper is made of wheat.

"In April, 1890, I was at the place on Holliday street, in Baltimore, where Mr. R. H. Woodrum had on exhibition his cigarette machine. Mr. Woodrum wanted me to go with him to Cuba and Mexico to introduce his machine, but we could not agree upon terms. I did not go. He showed me a part of a reel of Spanish paper; told me a Baltimore man got it for him; did not call his name; told me he had ordered 1,000 reels, and could get all he wanted. I did not know Mr. Gross at this time, but afterwards became acquainted with him. I told Mr. Woodrum he need not go to Cuba unless he had plenty of this paper. The paper then shown me by Mr. Woodrum was genuine Spanish cigarette paper, such as is used by the Spanish in Cuba. The paper itself is very common, but I never saw it put on reels before. It is put up in sheets and used by hand in manufacturing cigarettes."

Witness was then shown a piece of the sample paper, and testified that it was just like that Mr. Woodrum showed him in 1890, and was also shown one of the 500 reels, and he testified that the sample and the reel were exactly alike, and were both genuine Spanish cigarette paper.

The witness here made tests before the jury by burning and dampening and tearing the two samples of paper to show they

Opinion.

were the same kind, after which he repeated that they were the same kind of paper, and both were genuine Spanish cigarette paper.

The defendant, on the other hand, admits the contract, but seeks to avoid his obligation to pay for the paper he had ordered, by stating that it was not the right sort of paper, and cut properly to fit the Luddington machine, thus contradicting the evidence of the plaintiff and his own admissions as set forth above, that it was the very paper he wanted. And it will be remembered that he had had one reel for a considerable time, and afterwards paid the \$200, which was only due and payable upon compliance with the contract on the part of Gross, and did not refuse to take the 499 reels for a considerable time.

The jury, the proper triers of the fact, have decided against him, and the court did not err in refusing to disturb the verdict. There is no principle upon which he can complain; the verdict was for less than the paper actually cost Gross according to the evidence, and very much less than he charged for it.

There was no agreement between the parties as to the price to be paid for the paper, and the record does not disclose the principle upon which the damages were assessed, but the jury was properly instructed by the court as follows:

Plaintiff's Instructions:

If the jury believe from the evidence that when the said Woodrum gave the order for 500 reels he waived all conditions of the contract except that the paper should be like the sample, they must find for the plaintiff, provided they believe that the paper is like the sample; which was accordingly given by the court.

And the defendant asked the court to instruct the jury as follows:

Opinion.

Defendant's Instructions:

The court instructs the jury that the order given by R. H. Woodrum, dated June 6th, is to be construed in connection with contract between the plaintiff and Woodrum, dated April 3, 1890, and with all the other evidence in the case, and before the plaintiff is entitled to recover in this action, the jury must believe from the evidence that the plaintiff has complied with every substantial condition in said contract provided for, unless the jury believes from the evidence that said Woodrum waived said contract; which was given by the court accordingly.

The plaintiff does not complain of the verdict, and there is no ground upon which the defendant can complain, as we have said, and upon the whole case we are of opinion to affirm the judgment complained of.

JUDGMENT AFFIRMED.

Wytheville.

STEAGALL v. STEAGALL.

BARR & AL. v. SAME.

JUNE 22d, 1893.

RESULTING TRUSTS—Married Women—Estoppel.—A married woman is not estopped from claiming as against her husband's creditors, a resulting trust in land paid for by her father and intended to be hers, but deeded to her husband by his collusion with the grantor, by reason of the failure of her father and herself to take positive action during his lifetime, if she did not then know how the title stood, nor what her father's intentions were, and did assert her title before it was assailed.

Appeal from decree of circuit court of Washington county, rendered October 6, 1887, in two chancery causes heard together wherein Mrs. M. E. Steagall was complainant in the first, and A. J. Steagall, Jr., was defendant; and in the second, W. F. Barr & al. were the complainants, and said A. J. Steagall, Jr., was defendant. Opinion states the case.

G. W. Wood, and Daniel Trigg, for appellant.

Honaker & Hotters, for appellee.

HINTON, J., delivered the opinion of the court.

These causes were by a decree of the circuit court of Washington county heard together.

But the only controverted question in the cases arises be-

. Opinion.

tween Mrs. Mary E. Steagall and the creditors of her husband, and that is whether the tract of 63½ acres of land in the proceedings mentioned is the land of her husband, from whom she has been divorced, or whether there is a resulting trust in her favor. Such a trust arises when an estate has been purchased in the name of one person and the purchase money or consideration has been paid by another.

In such cases the presumption of law is that the party paying for the estate intended it for his own benefit, and that the nominal purchaser is a mere trustee. The trust results from the original transaction, and arises at the time of the execution of the conveyance, or not at all, and it is founded upon the payment of the money or consideration. Payment, therefore, of the purchase money by the alleged *cestui que trust* before or at the time of the purchase is indispensable. And as the trust arises out of the circumstance that the moneys of the real and not of the nominal purchaser formed at the time the consideration of the purchase and became converted into it, a subsequent payment will not, by relation, attach a trust to the original purchase. *Miller v. Blose*, 30 Gratt., 751; *Hill on Trustees*, m. p., 95; 2 *Minor's Institutes*, m. p., 191.

The proof, however, which is thus to create a trust which is to override the deed, should be clear and convincing. Mere loose or equivocal facts, such as possession of the property by the party who is alleged to have advanced the money, will not be sufficient, but the circumstances must be such as lead irresistibly to the conclusion that the money could not have been paid by the nominal purchaser, and mere parol evidence should be received with great caution. *Bank U. S. v. Carrington*, 7 Leigh, 581; *Miller v. Blose*, *supra*; *Hill on Trustees*, m. p., 97.

In *Miller v. Blose* this court said: "The ground of a resulting trust is, that the payment of the purchase money is an equity to have the land. But the mere fact of payment will not always be sufficient to raise a clear presumption of a trust. Evidence of intention must often enter into the fact whether

Opinion.

that payment is such an equity under the circumstances." If the money is furnished by a parent, or one standing in *loco parentis*, to the grantee, who is an infant, or if he is the grantee's husband, the supposition that the grantee was meant to be, by implication, only a trustee, is repelled, and supplanted by the contrary presumption that the design was to make a provision for the child or wife, unless it be made clearly to appear that in the particular case the presumption is misplaced. 2 Min. Inst., m. p. 191, and cases cited. And the case of the payment of the money by the father-in-law when the son-in-law is the grantee, in *Miller v. Blose, supra*, is placed in this category.

Now, applying the doctrine of resulting trusts as just stated to the facts in this record, it clearly appears that there is a resulting trust as to this property in Mrs. Steagall, and the presumption that this was a provision for his daughter by George Keller is entirely dissipated. The concurrent testimony of all the witnesses who speak upon the point, as well as the irresistible deductions from the correspondence which passed between Clarkson Coffin and the said George Keller in relation to the collection of the purchase money, proves beyond a doubt that George Keller paid the whole of the consideration, while the admission of A. J. Steagall, the husband, shows that he obtained the legal title by collusion with "old lady Coffin," who "was a pretty good friend to him, and had the deed made to him," in defiance of the intention of his father-in-law.

But it is contended, that admitting all this, that the failure of George Keller during his life, and Mrs. Steagall since, to assert her rights, ought to conclude her as against creditors. To this we cannot assent. The rights of Mrs. Steagall were fixed at the time of the execution of the deed, and, so to speak, could not be divested by the failure of her father to take some positive action afterwards. He did, however, express his dissatisfaction with what Steagall had done, and told him that it must be changed. As to Mrs. Steagall, it does not distinctly appear

Opinion.

that she knew how the legal title stood, or exactly what her father's intentions were, until after the death of her father. She was under all the disabilities of coverture until she was deserted by her husband in the year 1885, and she asserted her title long before it was assailed. This was all under the circumstances that we think could be expected of her.

The decree appealed from is clearly erroneous and must be reversed and annulled, and the cause must be remanded for a decree to be rendered in conformity with the views herein expressed.

DECREE REVERSED.

Wytheville.

BEAL v. CITY OF ROANOKE.

JUNE 22d, 1893.

1. MUNICIPAL CORPORATIONS—*Delegation of authority.*—City Council cannot delegate to a committee its authority to sell the city's real estate.
2. *IDEM*—*Pursuance of Authority.*—Where council referred petition for purchase of such estate to "the Sewer Committee and the city solicitor with power to act," such committee cannot bind the city by a contract to sell without the solicitor's concurrence.
3. SPECIFIC PERFORMANCE—*Relief conformable to bill.*—Where the bill alleges contract with defendant to sell plaintiff real estate in fee, and the proof is of a contract for "the right to erect a building on it."

HELD:

Specific performance cannot be decreed.

Appeal from decree of the hustings court of the city of Roanoke, rendered June 6, 1891, in a suit in equity, wherein D. R. Beal and S. G. Sibert were complainants and the city of Roanoke was defendant. Opinion states the case.

Phil. Lockett and Penn & Cocke, for appellants.

Thomas W. Miller and Esten Randolph, for appellee.

LEWIS, P., delivered the opinion of the court.

This was a suit in the hustings court of the city of Roanoke for the specific performance of an alleged contract for the sale of certain real estate. The facts are few and simple, and are substantially these:

Opinion.

The appellants, by their petition, addressed to the city council, proposed to purchase "the right to erect a building" over a certain sewer on a designated lot owned by the city. This petition was referred by the council "to the sewer committee and city solicitor, with power to act." A few days thereafter the chairman of the sewer committee addressed a note to the appellants' attorney, saying the committee had "placed the value of the space over Trout run at \$750." The city solicitor, however, took no part in this action, but advised the committee that it had no authority to sell the property, and could only report the facts to the council. It appears that one Berkowitz then offered the committee \$760 for the property, subject to its use by the city for sewer purposes, and that the committee thereupon recommended to the council the acceptance of this offer.

The appellants, however, appeared by attorney before the council and opposed the adoption of the report. They insisted that the letter of the chairman of the sewer committee above mentioned was a distinct offer to sell the property at a certain price; that this offer had been accepted in writing; and that the offer and acceptance together constituted a completed contract. The council took a different view of the matter, and ordered the property to be put up at public auction, whereupon the appellants filed their bill against the city, praying that the advertised sale be enjoined, and that the alleged contract be specifically enforced.

To this bill the city demurred, and also answered, and when the cause came on to be heard, the bill was dismissed by the decree complained of.

It is clear that there is no error in this decree. In the first place, assuming that the city had authority to sell the property in question, the power to do so was a discretionary one, which, upon well settled principles, could not be delegated by the council to a committee. "The principle is a plain one," says Judge Dillon, "that the public powers or trusts devolved by

Opinion.

law or charter upon the council or governing body [of a municipal corporation], to be exercised by it when and in such a manner as it shall judge best, cannot be delegated to others." 1 Dill. Mun. Corp. (3d ed.), sec. 96. And the same principle was recognized by this court in the recent case of *McCrowell v. City of Bristol*, 89 Va., 652, where the subject is discussed in an elaborate opinion by Judge Richardson.

Moreover, when the appellants' petition was presented to the council, the matter, as we have seen, was referred to the sewer committee and the city solicitor; so that even if it were competent for the council to delegate its powers in respect to making a sale of the property to a committee thus constituted, no contract could have been made binding on the city without the concurrence of the city solicitor; and that officer, so far from agreeing to a sale, advised the committee that a sale could be made only by the council.

Besides, the alleged contract, asserted in the bill, is for the sale of the property in fee, whereas the offer to the council was to purchase, not the fee, but only "the right to erect a building" on the lot, subject to certain specified reservations and conditions. In any aspect of the case, therefore, no right to specific performance has been shown, and the decree must be affirmed.

DECREE AFFIRMED.

Wytheville.

MORGAN v. COMMONWEALTH.

JUNE 29th, 1893.

INDICTMENT—*Sale of Liquor—Evidence—New Trial.*—Indictment for unlawful sale of ardent spirits, charged that the offence was committed in a certain district where, under the local option law, "no license" prevailed. The evidence was that the defendant sold ardent spirits to witness in the county, but did not designate the district. Defendant moved to set aside the verdict of "guilty as charged in the indictment," and for a new trial; which motion was overruled.

HELD:

The motion should have been sustained.

Error to judgment of circuit court of Montgomery county, affirming a judgment of the county court of said county, whereby the plaintiff in error, Daniel Morgan, was adjudged guilty of selling liquor unlawfully and fined \$125 and sentenced to imprisonment for sixty days in the county jail. Opinion states the case.

Hoge & Hoge, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LACY, J., delivered the opinion of the court.

The case is as follows:

The plaintiff in error was indicted in the said county court on the 24th day of February, 1891, by a special grand jury,

Opinion.

that he did, in Auburn magisterial district, in Montgomery county, within twelve months next preceding the indictment, unlawfully sell wine, spirituous and malt liquors, and a mixture thereof, to R. L. Shanklin. The jury, on the trial, found him guilty as charged in the indictment, and fixed his fine at \$125, and the court ascertained his term of imprisonment at sixty days. The plaintiff in error moved the court to set aside the verdict and grant to him a new trial, which motion the court overruled, and rendered judgment on the verdict. And the accused excepted, and tendered his bill of exceptions, which was signed and sealed and made a part of the record. Wherein the court certified that, upon the trial of the case, the commonwealth proved by the witness Shanklin that he purchased from defendant a pint of brandy in West Radford, in Montgomery county, twelve months before the finding of the indictment, and that the defendant had the appearance of a bar; and then proved by the depot agent at Radford that there was a shipment of spirits to one D. Morgan; that the same was delivered to draymen, and that he did not know that same was delivered to the defendant, nor that the defendant was the owner of the same.

The jury, in their verdict, found the defendant guilty as charged in the indictment, and fixed his fine at \$125.

The first question we will consider is the action of the court in refusing to set aside the verdict and grant a new trial on the motion of the defendant. The indictment charged that the unlawful act was committed in Auburn magisterial district, and was essential, as the vote on "license" or "no license" is required to be held by districts and not by counties.

It was said by Samuels, J., in the case of the *Commonwealth v. Head*, 11 Gratt., p. 819: "An indictment or presentment should always allege the offence with so much fullness and precision of description that the defendant may know for what he is prosecuted, and thereby be enabled to prepare his defence; and further that the conviction or acquittal

Opinion.

may be pleaded in bar of any future prosecution for the same offence."

This offence is local in its nature; place is of its essence, and yet no place is alleged, but the whole county, and the indictment was held bad. So it is an essential that the place shall be set forth.

The evidence does not prove that it was in the Auburn district, but at a place in Montgomery county, whether in Auburn district or not does not appear. The action of the county court in refusing to set aside the verdict, and rendering judgment on the verdict was erroneous, and the said action of the said county court ought to have been set aside and reversed.

We are therefore of opinion to reverse the action of the circuit court and rendering such judgment as said circuit court ought to have rendered, to reverse the judgment of the said county court and remand the case to the said county court of Montgomery county for a new trial in the case, which will be ordered to be certified to the said county court of Montgomery county.

FAUNTLEROY, J., dissented.

JUDGMENT REVERSED.

Wytheville.

EXCHANGE AND BUILDING CO. V. ROANOKE GAS AND WATER CO.

JUNE 29th, 1893.

WATER COMPANIES—Powers—Meters.—The charter of a water company provides that all water rates shall be uniform throughout the city for the same class of service, and designates special charges for hydrants, but also provides that the charge shall not exceed a certain sum per hundred gallons for the amount supplied.

HELD:

The company may use either the hydrant as a means of charge or any other reliable instrument which will measure the quantity used, and charge some of its customers by the gallon, and at the same time charge others by the hydrant, though it cannot lawfully discriminate between water taxes of the same class.

Appeal from decree of circuit court of city of Roanoke, rendered June 2, 1893.

The bill in this case was filed by the appellant, the Exchange Building Company, of Roanoke City, seeking to enjoin the appellee, the Roanoke Gas and Water Company, from placing a water meter on the water pipe conveying water to the building of the said complainant, the Exchange Building Company. The ground upon which the injunction was asked, is that the said gas and water company was proceeding in excess of its chartered powers by attempting to place a meter on the water pipe in question, and charging, as the water company declared its purpose to do, twenty-five cents per thousand gallons of water used. Whereas such meters were not placed on all the water pipes of the said water company, but in many instances,

Statement.

indeed, in the majority of cases the said company did not place meters in the water pipes nor charge the consumer or water taker by the gallon, but without meters charged \$9 per hydrant, or a sum certain. And a provision of the charter of the water company is cited to the following effect, provided "that the water shall be supplied to such districts as furnish sufficient demand to make it remunerative to this company, and the water rates shall be uniform throughout the town for the same class of service," and again the provision in the said charter, "in consideration of allowing the transfer of privileges to it, the Roanoke Gas and Water Company agrees and binds itself to furnish water to the city fire hydrants for \$25 apiece per annum, and to storehouses using only one hydrant at \$9 apiece per annum."

That the several tenants of the complainant occupying apartments, stores, a boarding house, and a bank, each had a hydrant, and had by agreement paid directly to the water company heretofore \$9 apiece for each hydrant in use in the building of the complainant, and there had been no other or greater charge against the complainant for water used in the building, whereas if the system should be changed the complainant would not know how to apportion the water rates between its tenants, and would suffer irreparable loss, for which there could be no adequate remedy at law; that the damages would be too uncertain to be properly and accurately ascertained.

The injunction was awarded according to the prayer of the bill. And subsequently the complainant amended its bill set forth, that from the date of its franchise the water company aforesaid had employed a system of charges based upon the number of hydrants and the purposes for which the water was used; but during the last twelve months the said water company had undertaken to place water meters upon such premises and in such houses as it might deem it to its advantage to do so, whilst leaving other premises and houses of the same

Statement—Opinion.

class of service, in the same section of the city, and upon the same streets, with water supply upon the old system, and that the effect is to destroy the uniformity of rates throughout the city. And the complainant filed with its bill certain extracts from the charter of the water company, including those cited above and this additional clause:

“IV. That the charge made for water shall not exceed five cents per hundred gallons for the amount supplied, nor fifty dollars per annum for each hydrant for town use.”

To these bills the defendant, the Roanoke Gas and Water Company demurred, and moved the court to dissolve the injunction awarded in the case.

Whereupon the circuit court sustained said demurrer and dissolved the injunction, and the plaintiff applied for and obtained an appeal to this court.

Penn & Cocke, for appellant.

Watts, Robertson & Robertson, for appellee.

LACY, J., (after stating the case) delivered the opinion of the court.

There is but one question disputed in this cause, the sole question at issue being whether the Roanoke Gas and Water Company, under and by virtue of its charter, is authorized to charge some of the consumers of water, or water takers in the city of Roanoke, by the gallon, and at the same time to charge others by the hydrant. Or whether charging some of the said waters by the hydrant, it may, under its charter, nevertheless charge still others by the gallon, all other questions being conceded in the argument here by the appellee.

The charter does provide that “all water rates established shall be uniform throughout the town *for the same class of service.*” And the charter does provide, as is also relied on by

Opinion.

the plaintiff, the appellant here, that "the charge for fire hydrants shall be \$25, and for storehouses using only one hydrant, \$9." But the charter also provides, as is urged by the appellee, "that the charge made for water shall not exceed five cents per hundred gallons for the amount supplied, nor fifty dollars per annum for each hydrant for town use."

These provisions are parts of the same instrument, and, if not inconsistent, should be construed together. And while it is clear that the water company cannot lawfully discriminate between water takers of the same class so as to make their water rates otherwise than uniform, yet by its charter the water company is authorized to use either the hydrant as a measure of charge, or use any reliable instrument which will measure the gallons used, and so enable it to charge by the gallon. The water rates must be uniform throughout the town *for the same class of service*, and the water company cannot charge on water more than another in the same class of service.

But the complaint in this case is that the water company is about to measure the water used by the plaintiff company. This the charter impliedly authorizes when it allows a charge by the gallon. And the further complaint is that this charge is twenty-five cents per thousand gallons, or two and a half cents per hundred gallons. This is expressly authorized by the charter, and it does not appear that this charge, which is only one-half of the charge allowed by the charter, will be greater than is charged by the hydrant at \$9, and while the appellant has two stores, it has also a bank and a hotel among its buildings, and it could not claim that it is only one storehouse using one hydrant. But its water pipe supplies all of these, which are not of the class known as storehouses.

While a water company may be enjoined for exceeding its charter powers, there is no ground in this case to enjoin the appellee company from putting metres in its service pipes, such being plainly within the terms of its charter.

Opinion.

There was, therefore, no error in the action of the circuit court in overruling the demurrer of the defendant to the bills of the plaintiff and dissolving the injunction, and the said decree is therefore affirmed.

HINTON, J., dissented.

DECREE AFFIRMED.

Wytheville.

COMBS v. COMMONWEALTH.

JUNE 29th, 1893.

1. CRIMINAL PROCEEDINGS—*Special grand jury*.—Without a writ of *venire facias* a special grand jury may be summoned from a list furnished by the judge. *Robinson v. Com.*, 88 Va., 900.
2. IDEM—*Legal session—Special judge*.—A county court is in regular session on the second day of a term on which it is opened by the judge thereof, when an order is made stating that owing to his disability to preside at the trial of any cause on the docket another specified judge took his seat and proceeded to dispatch business, the record stating that the latter judge signed the orders of that day.
3. IDEM—*Evidence*.—Testimony that certain corn found in the house of one on trial for larceny thereof, was the corn stolen, in the witness' opinion, and to the best of his knowledge and belief, founded on the fact that certain articles were in it that were also in the stolen corn.

HELD:

Unobjectionable.

4. IDEM—*Record*.—There need not be set out in the record the writ of *venire facias* for the trial jury in a criminal prosecution.

Error to judgment of circuit court of Carroll county, affirming a judgment of the county court of said county, rendered August 22, 1892, sentencing the plaintiff in error, one L. C. Combs, who had been found guilty at the trial of an indictment for burglary, to imprisonment in the State penitentiary for a term of two years. Opinion states the case.

D. W. Bolen, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

Opinion.

HINTON, J., delivered the opinion of the court.

The indictment upon which the prisoner was tried in the county court charges him with a felony in entering a certain grist mill with intent to steal, and stealing therefrom five bushels of meal.

On being led to the bar the prisoner moved the court to quash the indictment, which motion being overruled, he was arraigned, and upon his arraignment pleaded "not guilty," and was remanded to jail. At a subsequent day of the term the order showing his arraignment and plea of not guilty was, on his motion, set aside. The prisoner then tendered three special pleas in abatement, to each of which the attorney for the commonwealth filed a special replication, and accused taking issue on said replication, asked that a jury might be empanelled to try said issues. This the court refused to do, and the prisoner excepted.

The first plea alleges that the grand jury, by whom the prisoner was indicted, was never summoned by any writ of *venire facias* or other legal process.

Plea No. 2 alleges that the court was not in legal session the day the indictment was found, and the records were never signed by the judge of the court.

The third plea alleges that the grand jury, by whom the said indictment was found, was not summoned to appear as a grand jury, and that none of the persons who served on said grand jury were summoned as grand jurors to appear and serve as such at the May term, 1892, of the county court of Carroll county.

Upon an examination of the record we are satisfied that none of these exceptions are tenable.

The indictment is in the usual form, and we are unable to perceive any reason why it should have been quashed. And as to the other exceptions, they are all controlled by principles which have been laid down in the following cases: *Robinson v.*

Opinion.

Com., 88 Va., 900; *Gravelly v. Com.*, 86 Va., 402; *Gresham v. Ewell*, 85 Va., 1.

The indictment in this case was found by a special grand jury, and in *Robinson v. Com.*, *supra*, it was distinctly held that a special grand jury may be summoned without a writ of *venire facias* from a list to be furnished by the judge, and it appears from the statement of the judge that such a list was furnished, and that eight of the persons whose names were embraced in said list appeared, and were impannelled and sworn as the grand jury. This disposes of the first and third pleas.

On the first day of the term, as the record shows by necessary implication, the court was opened by the Hon. N. P. Oglesby, the judge of said court, when the orders impannelling the grand jury were entered. It also appears that he opened the court on the second day of the term, and that sometime during that day an order was entered, which order is in the following words, to-wit: "The judge of this court being so situated as to render it improper in his judgment for him to decide or preside at the trial of any case on the docket which have been undisposed of up to the present time of this term of the court, the Hon. R. L. Kirby, judge of Grayson county, thereupon took his seat upon the bench and proceeded to the dispatch of the business on the docket now remaining undisposed of." And it is stated in the record, and nowhere denied, that the orders of the second day, including the adjourning order, was signed by the said R. L. Kirby. Now this is all that is required by the statute, or the decision in *Gresham v. Ewell*, *supra*, and this being so, it is a matter of no moment whether Judge Oglesby or Judge Kirby happened to be presiding at the exact *punctum temporis* when the grand jury came in with this indictment.

The next ground of exception is that the accused was prejudiced by the manner in which the witness, David Cruise, "was allowed to give in his testimony," and by some of the ques-

Opinion.

tions which were put to him. But we see nothing in the record which gives countenance to either of these objections. The witness, having testified that he had missed several bushels of corn out of his mill on Monday morning which had been in his mill on the preceding Saturday night, and that there was some Fultz wheat and poplar shavings mixed in said corn, was asked if the corn that he found at the house where the accused lived was the same corn which came out of the mill, answered: "That is my opinion, to the best of my knowledge and belief." He was then asked: "On what facts do you found your belief and knowledge?" to which the witness replied: "Because we found wheat and shavings in the corn that identified themselves—it was Fultz wheat and poplar shavings in the corn at the mill." These questions are not leading, nor is there anything that we can perceive in the witness' mode of testifying.

The next exception is to the refusal of the court to set aside the verdict and grant the prisoner a new trial, but as neither the facts nor evidence is certified, we have nothing from which we can determine this question, but answers of Cruise just referred to go far to identify the corn in the prisoner's house as the corn which was stolen. See *Gravelly v. Com.*, 86 Va., 402, where this kind of evidence is commented on by Lewis, P.

The last exception is the writ of *venire facias*, for the trial jury is not set out in the record, but this is not required. See *Spurgeon's Case*.

This disposes of the various assignments of error, and the result is that the judgment of the circuit court must be affirmed.

JUDGMENT AFFIRMED.

Wytheville.

THOMAS v. COMMONWEALTH.

JUNE 29th, 1893.

1. CRIMINAL PROCEEDINGS—*Indictment*.—Indictment laying the charges of unlawfully selling different kinds of intoxicating liquors in the disjunctive, is sufficient. *Morgan's Case*, 7 Gratt., 592.
2. ELECTION UNDER REPEALED STATUTE—*Validity*.—An election held July 1, 1886, under act of February 26, 1886, was not invalidated by repeal of that act after May 1, 1888, by the adoption of Code, § 4202.
3. JUDICIAL COGNIZANCE—*Election*.—The court will take notice judicially that at an election held under act of February 26, 1886, in the magisterial district wherein the offence is laid, the vote against license prevailed, and no allegation to that effect is necessary in the indictment (*Savage's Case*, 84 Va., 582); and also that apple brandy is intoxicating.
4. CLERICAL ERROR.—A mistake as to the date of an order entered in the record of the county court in relation to such election will not invalidate the election.

Error to judgment of the judge of the circuit court of Russell county refusing a writ of error to the judgment of the county court of said county, rendered February, 1892, on an indictment for unlawfully selling intoxicating liquors against the plaintiff in error, James Thomas. Opinion states the case.

J. C. Gent, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LEWIS, P., delivered the opinion of the court.

Opinion.

This was a prosecution in the county court of Russell county against the plaintiff in error for a violation of the local option law. There was a demurrer to the indictment, which was overruled, whereupon issue was joined on the plea of "not guilty." The jury found the defendant guilty, and assessed a fine against him of \$100, and there was judgment accordingly. To this judgment the defendant applied to the judge of the circuit court for a writ of error, which was refused, whereupon, on his petition, a writ of error was awarded by this court.

The indictment charges that the defendant, in October, 1891, "at his dwelling house, in the Lebanon magisterial district of said county, did unlawfully sell intoxicating liquors, wine, ardent spirits, spirituous or malt liquors or mixtures thereof."

The first ground of demurrer relied upon here is that the indictment is in the disjunctive. But this objection is met by *Morgan's Case*, 7 Gratt., 592. In that case the indictment was for unlawfully selling rum, wine, brandy or other spirituous liquors, and was demurred to, on the ground that the charges were laid in the disjunctive; but the demurrer was overruled by the trial court, which ruling was affirmed by the appellate court. This case was decided in 1850, and has ever since been followed as authority in Virginia in similar cases.

It is next insisted that the demurrer ought to have been sustained, because "the local option act" of February 26, 1886 (Acts 1885-'86, p. 258), was repealed by section 4202 of the Code, and because the provisions of chapter 25 of the Code, in regard to local option, have never been put in force in Russell county.

We are of opinion that this position also is untenable. Granting that by virtue of the said section the act of February 26, 1886, gave way to the provisions of chapter 25 of the Code, on the same subject, it does not follow that what was done under the said act, prior to the going into effect of the Code, was thereby undone or set aside. So that the result of the election which was held in Russell county on the 1st day of

Opinion.

July, 1886, under the above mentioned act, was not affected by the subsequent adoption of the Code.

It is contended, however, that there is nothing to show that the Lebanon magisterial district voted "against license" at that election. But this was a matter of which the trial court, according to *Savage's Case*, 84 Va., 582, was bound to take judicial notice, and the question was decided against the defendant; nor is there anything to show that it was erroneously decided. There is, indeed, an order of the county court copied into the record of the present case, upon which the defendant relies, which is as follows, to wit:

"At a court of *quarterly* session continued and held for Russell county at the court-house thereof on Thursday, the 8th day of *June*, 1886, E. S. Finney, J. B. Seacatt, and W. R. Akers, commissioners of election for Russell county, this day filed their certificate of the special election held on the 1st day of July, 1886, upon the question of licensing or not licensing the sale of intoxicating liquors in said county, and report a majority of 713 votes against licensing the sale of intoxicating liquors in said county."

This order was evidently entered, not in June, 1886, but after the 1st of July of that year. The mistake is doubtless that of the copyist; for the transaction referred to occurred after the 8th of June; and, besides, we must take judicial notice of the fact that the June term of the county court of Russell county is not a *quarterly* term. The quarterly terms of that court are, or were when the order in question was entered, the April, *July*, September, and December terms (Acts 1885-'86, p. 570). Moreover, the act of February 26, 1886, required a copy of the certificate of the canvassers of the election returns to be laid before the county court at its *next* term after any election held under the act, and the presumption is that this requirement of the statute was complied with in the present case.

It is true the order does not state the result of the election

Opinion.

in the Lebanon magisterial district, nor was it necessary that it should. The act did not require a copy of the certificate to be spread *in extenso* on the order book; all it required was that a copy should be laid before the court; and, for aught the record shows, the copy that was laid before the court was in the form prescribed by the statute, and showed that the Lebanon district voted, as the county did, against license.

The only remaining assignment of error is that the evidence does not show that the liquor sold by the defendant was intoxicating. It shows, however, that it was apple brandy, and that apple brandy is intoxicating is a matter of common knowledge, of which the court will take judicial notice. 1 Greenl. Ev. (14th ed.), sec. 5, note (b), p. 10.

JUDGMENT AFFIRMED.

NOTE.—Subject of judicial notice as to what liquors are intoxicating as well as the question what liquors are within the statutory restrictions on the sale of “spirituous,” “vinous,” “fermented,” and other intoxicating liquors is treated in a note to *Lamly v. State* (Miss.), 2 L. R. A., 645.—*Reporter*.

Wyntheville.

SHORT v. COMMONWEALTH.

JUNE 29th, 1893.

1. CRIMINAL PROCEEDINGS—*Impannelling Jury*.—A person summoned as one of a panel of sixteen free from exception, who at the time of selecting the jury is serving on the grand jury, is not "in attendance," in the sense of Code, § 4019; and it is not error to refuse to place him on the panel, or examine him on his *voir dire*.
2. IDEM—*Objections too late*.—In the appellant court objection cannot be made for the first time that a person served on the jury without being selected by the court or summoned by the sheriff.

Error to judgment of circuit court of Russell county, rendered March 16, 1893, affirming a judgment of the county court of said county, sentencing the plaintiff in error, Thomas Short, to confinement in the penitentiary for eighteen years, in accordance with the verdict of the jury, for the murder of T. F. McGaw. Opinion states the case.

J. C. Gent, for plaintiff in error.

Attorney-General R. Taylor Scott, for the commonwealth.

LEWIS, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Russell county, affirming a judgment of the county court of that county, sentencing the plaintiff in error to confinement in the penitentiary for murder in the second degree.

Opinion.

The principal ground of error is that the jury was not selected and impannelled in the manner provided by law.

It appears that after a panel of sixteen persons had been obtained from those summoned, and before the jury had been sworn, the prisoner challenged the whole array, and moved to quash the panel on the ground that Thomas Johnson, who had been summoned from the first list furnished by the judge, had not been placed on the panel, or sworn on his *voir dire*. The trial court, however, certifies, as the ground of its action in overruling the motion, that "before the calling of the *venire* in this case, Johnson had been impannelled as a grand jurymen," and was serving as such when the jury was selected and sworn.

It is contended that the court ought to have withdrawn Johnson from the grand jury, and required him to be sworn on his *voir dire*, and placed on the panel, if found free from exception; and that, in consequence of the ruling of the court in this particular, the prisoner has not been convicted by "due process of law," or according to the law of the land.

There is nothing, however, in this objection. The statute provides that in any case of felony, where a sufficient number of jurors to constitute a panel of sixteen free from exception cannot be had from those summoned and *in attendance*, the court may direct another *venire facias* (as was done in this case), and cause to be summoned from the bystanders, or from a list to be furnished by the court, so many persons as may be deemed necessary to complete the panel. Code, § 4019.

In the present case Johnson's name was on the original list furnished by the judge, but when he was called, he was not "in attendance" within the meaning of the statute, because he was at the time serving on the grand jury; and this was sufficient justification for the ruling objected to.

Another point, which is made for the first time in the brief of the counsel for plaintiff in error, is that "S. H. Wyatt served on the jury without being selected by the court or summoned by the sheriff."

Opinion.

It appears that there were two writs of *venire facias* in the case, and two lists furnished by the court or judge, and that the only Wyatt whose name was on either list was "*Dick Wyatt*." The only Wyatt on the petit jury was S. H. Wyatt. This, however, may be a mistake in copying the record, or "*Dick*" may have been a nickname. But be that as it may, there was no objection to the juror in the trial court, and that is decisive of the point now made, there being nothing in the record to show that the prisoner was injured by the irregularity complained of, if in fact any such irregularity in the proceedings occurred.

The statute is express that "no irregularity in any writ of *venire facias*, or in the drawing, summoning, returning, or impannelling of jurors, shall be sufficient to set aside a verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the swearing of the jury." Code, § 3156; Acts 1887-'88, p. 18.

It is hardly necessary to notice the only remaining assignment of error, which is that the court itself certifies that "the jury had not been selected in the manner provided by law," because it is obvious from the context that this is certified, not as the conclusion of the court, but as one of the grounds of the prisoner's objection to the manner in which the jury had been impannelled.

JUDGMENT AFFIRMED.

Wytheville.

TILLEY v. COMMONWEALTH.

JULY 6th, 1893.

MURDER—Suspicion not Proof—Case at Bar.—In case at bar, HELD, that though the facts certified in the record present strong grounds of suspicion against the prisoner, yet they are not sufficient to establish beyond a reasonable doubt the prisoner's guilt of the crime for which he stands indicted.

On rehearing of the case of *Tilley v. Commonwealth*, reported in 89 Va., 136. Opinion states the case.

Walker & Caldwell, for prisoner.

Attorney-General R. Taylor Scott, for commonwealth.

HINTON, J., delivered the opinion of the court.

The prisoner, Robert L. Tilley, was tried in the circuit court of Carroll county for the murder of one Louisa Haynes. He was found guilty of murder in the first degree and sentenced to be hanged. His case was then brought, by writ of error, to this court, where the judgment of the circuit court was affirmed on the 23d of June, 1892. See 89 Va., p. 186. That decision having been rendered by a court of three judges, it was deemed best, in view of the gravity of the crime and peculiar circumstances of the case, to order a rehearing; and it has accordingly been reheard before a full bench.

Opinion.

The material facts are these: In the month of November, 1887, the prisoner, accompanied by a brother, Joe Tilley, came from Kentucky to Bristol, Tenn., on his way to visit his mother, who lived in North Carolina near the Virginia line. When they reached Bristol they heard that Littell Haynes and his family, including a single daughter, Lou, were living there. The Tilleys were old acquaintances of the Hayneses, having lived in the same neighborhood in Carroll county, Virginia, and they visited the family in Bristol. They reached Bristol on Wednesday or Thursday; and on Saturday the prisoner and his brother, with Lou Haynes and a girl named Sue Dean, started together to visit their friends in Virginia and North Carolina. The prisoner paid Lou Haynes's railroad fare to Wytheville, and his brother paid Sue Dean's. They remained in Wytheville during the day of Saturday, and in the afternoon Joe Tilley left the party and reached his mother's home on Sunday evening. The others stayed in Wytheville all night and left on Sunday morning. The "prisoner bought a new pair of gaiter shoes in *Bristol* of fine quality, with very narrow toes and very small heels, and * * had no other shoes," and, it is proved, "wore those gaiters on the day Lou Haynes was killed." The prisoner and the two girls camped out Sunday night near Carroll Courthouse, and on Monday got breakfast at the hotel at the Courthouse, the deceased paying the bill. From the Courthouse the three went on foot to the residence of James Dean, an uncle to both girls, who resided on the Fancy Gap road about two miles from the State line. At that point the prisoner left them. The two girls stayed at James Dean's until the next morning, when they went into North Carolina about a mile or two over the line, and the deceased went to the house of one McMillan, and the other girl to the house of one Phillips. The prisoner reached his mother's house on Monday evening. On the next morning he had \$300 in money. The deceased remained at McMillan's until Wednesday night after dark, when she left,

Opinion.

and about 8 or 9 o'clock in the night came to the house of Phillips after the family had retired. Although the family had retired, when she knocked some one got up and let her in. A few minutes after the prisoner and his brother came to the house and remained until 10 or 11 o'clock, and then left, while the deceased remained all night. The next morning—that is, Thursday—a man named John Day came to Phillips' house, and after deceased started to go back to McMillan's house and had gone fifteen steps, he, Day, called to her. They had a short conversation, and went a very short distance together and then parted, going in different directions. When the deceased left Phillips' house on that fatal Thursday morning, she said she was going to Jeff McMillan's and Margaret Myrick's. It does not appear whether Day heard her say or knew in what direction she was going, but it is proved that the old wood road, to be hereafter spoken of, was the nearest way from the Green Hill road (154 yards from which the deceased was found dead) to Margaret Myricks. On that Thursday morning, *after* the deceased had left Phillips' house, and about 9 o'clock A. M., the prisoner came there and stayed a short while and left. About the middle of the forenoon the prisoner was on the Fancy Gap road, in North Carolina, talking to Sue Dean and Mary Phillips, when two men were seen coming up the road. Some one said that one of them was Fulton, a person with whom the prisoner had had a serious difficulty several years before, whereupon the prisoner pulled out a large pistol from his hip pocket and put it into his breast pocket, remarking: "If Fulton raises a fuss with me, I will make d——d short work of him." The deceased remained at McMillan's house on Thursday until after dinner, and soon after she, accompanied by Eliza McMillan, walked up the Fancy Gap road towards the Virginia line; that between McMillan's and the line, they were joined by the prisoner and his two brothers, James and Joseph Tilley, and that all five went as far as the State line, *laughing and talking*. They all remained seated on a

Opinion.

chestnut log for some time. While they were seated there a man named Smith sold one of the party some chestnuts, and then drove on along the Fancy Gap road into Virginia, and when he had gotten within two hundred yards of where the Green Hill road leaves the Fancy Gap road—that is, when he had gone about three-fourths of a mile north from the chestnut log—he heard the loud report of a rifle or large pistol in the direction of where the body was found, which he took to be the report of a *rifle* fired by some hunter.” Between 3 and 4 o’clock P. M. the deceased and the prisoner started up the Fancy Gap road into Virginia and the other three went back into North Carolina. It was in proof that on *Wednesday* the deceased had thirty dollars in paper money and some silver coin in a velvet purse, which she carried on her arm by a steel chain, but there is no proof whatever that she had the purse or any money whatever on her person at any time on *Thursday*. The last that was ever seen of the deceased alive was when she left the chestnut log in company with the prisoner, who was next seen about sundown, or a little before, about one mile from where the body was found, walking rapidly along the Green Hill road in the direction of his mother’s house, which was about one-fourth of a mile distant. He passed within ten steps of several persons who were gathering corn, but did not speak, or seem to care to speak, and one witness said: “He rather turned his head away.” None of the parties knew him except a boy, who had seen him at the school house the day before.

The account of the finding of the body is as follows: On the evening of *Thursday*, November 17, 1887, a Mr. Coe, who lived 200 yards from the spot where the body was found, discovered that the woods were on fire on Mr. Short’s land. He dispatched a messenger for Short, and went himself with his boys and surrounded the fire, which had burnt over about three-quarters of an acre or an acre of ground. When Short came they went back to the fire and saw the body of the de-

Opinion.

ceased lying in the lap of a tree about a foot from the ground, face downward, with a large bullet hole in the top of her head, which came out in the jaw. Her limbs were nearly all burned off and most of the flesh off her head and face. A number of buttons and a breastpin and other portions of her dress were raked out of the ashes under her body, but no silver or steel chain or finger rings were found. These charred remains were lying, as we have said, on the lap of a tree which had been blown up by the roots about three-fourths of a mile from the Fancy Gap road and 154 yards from the Green Hill road, in a secluded hollow in the woods by the side of an old road used by the owner of the lands as a wood road. It was proved that the body was the body of Lou Haynes; that when found it was lying on the face with the left arm under the body and the right drawn back behind the body. It was also proven that death was caused by the bullet wound.

A diagram of the *locus quo* shows that the State line forms with the Fancy Gap and Green Hill roads almost a right triangle, of which the Fancy Gap road may be called the altitude, the State line the base, and the Green Hill road the hypotenuse. From the chestnut log at the intersection of the Fancy Gap road there was a blind path which came out into the Green Hill road some 150 or more yards nearer the Fancy Gap road than the old wood road, in which the body was found, and the old wood road came into the Green Hill on the opposite side.

There was found on the Green Hill road, on the morning after the murder, between the point where the wood road on which the body was found, left the Green Hill road and in the direction of the Fancy Gap road, for a distance of about 200 yards, the tracks of a man and woman on opposite sides of the road going in the same direction and towards the old wood road, but no tracks were seen on the wood road. The woman's track was a No. 4 shoe, and the man's track an 8 or 9, and looked as if

Opinion.

made by a heavy brogan boot or shoe; and there were also seen at the same time the tracks of two men along the same distance, and also again near Fancy Gap road going in the opposite direction from the woman's track, and that all three of the men's tracks were about the same size and general appearance. It was also shown that from the State line to where the body of the deceased was found, by the roads was over one and a half miles. It was proven that a witness, one Luther Coe, just at 4 o'clock on the evening of the murder heard a cry "Oh!" coming from the direction in which the body was found, and in a minute after he heard the report of a gun or pistol in the direction of the cry. That the cry was not the cry of one in pain, distress, or alarm, but just a low cry of oh!

The body being found, an inquest was held the next day, and the verdict of the coroner's jury was that the deceased came to her death from the effects of a pistol wound in the head, fired by the prisoner.

A hundred or more people attended the inquest, and strong threats were made of lynching the Tilley boys, especially the prisoner, some persons going far enough to twist hickory withes into a rope with which to hang the prisoner if he should be brought to the spot.

A posse of men were verbally directed by a justice of Carroll county to go to the house of the prisoner's mother in North Carolina, about two and a half miles from the spot where the body was lying, and arrest the Tilley boys—James, Joseph, and the prisoner. They went to the house and found the family at dinner in the cellar, which was used as a dining room. Joe Tilley had just finished eating when the men arrived, and he went out first and invited them into the house. James Tilley next went up stairs. As soon as Joe Tilley and the men got into the house the leader of the men said: "I arrest you, Bob Leake Tilley, for the murder of Lou Haynes." These words were heard by Mrs. Gordon, who was in the cel-

Opinion.

lar, and probably by the prisoner, as they were uttered in a tone loud enough for any one to hear. And this was the first time, so far as the record discloses, that he ever heard that Lou Haynes had been killed and that he was suspected of the murder. The prisoner, who had spent the preceding night at his mother's in North Carolina and the morning at Green Hill, N. C., was eating his dinner when the party came to arrest the Tilley boys, and was left in the cellar or dining room when the rest went out, and was not seen again until dark, when he came into the yard of his mother's house, where he was met by his mother, his step-sisters, and C. F. Taylor, who told him he would be hung by a mob if arrested, and to leave the country at once, and under these circumstances he fled to Kentucky and went under an assumed name. He was arrested in the month of September, 1890, brought back to Carroll county and lodged in jail, where, although he seems to have been treated with the greatest harshness, he made no effort to escape. Indeed, on one occasion, when a lot of tools had been given him by another prisoner, with which he might have made his escape, he sent for his attorney and gave them to him.

Now upon this state of facts, for it must be observed that it is the *facts proved*, and not the evidence merely, which are certified, is it established beyond a reasonable doubt that the prisoner killed the deceased? We think not. That there are circumstances which afford strong ground of suspicion cannot be denied. But circumstances of suspicion merely, without more conclusive evidence, have never been held sufficient to justify conviction. Where, indeed, all the circumstances of *time, place, motive, means, opportunity, and conduct*, says a learned author speaking of circumstantial evidence, concur in pointing out the accused as the perpetrator of the crime, it must produce a moral, if not absolute, certainty of guilt. 1 Starkie, 491. *Dean's Case*, 924.

Opinion.

But do they all concur in the present case? The *corpus delicti*, to be sure, is clearly proven by the position of the hands, the character and location of the death wound, and the very efforts made to conceal the mode and manner of her death; but where do we find any evidence of motive? The commonwealth says it was robbery. But where is there to be found the slightest proof that on the day of her death she had on her person anything which could excite his cupidity, even if we assume that such was his purpose, or why should we suppose that such was his purpose, when he was not only not in want of money, since he is proven to have had \$300 himself, but when, from the manifest terms of intimacy which existed between them, it seems more than probable that he might have had any mere property she possessed for the asking. Of course, then, if what has been just said be true, the suggestion that robbery was the prisoner's motive, amounts to nothing more than the barest conjecture. Again, acts of flight, concealment and falsehood, "and many other *ex post facto* indications of mental emotion" are usually regarded as strong presumptive evidences of a consciousness of guilt, but in this case all these circumstances may be readily accounted for by the fact that the prisoner had every reason to believe that if he was tracked and overtaken he would be instantly hung without judge or jury. Fear, it must be remembered, may spring from causes very different from that of conscious guilt. "A person, however conscious of innocence, might not have the courage to stand a trial, but might, although innocent, think it necessary to consult his safety by flight," said Justice Abbott once in delivering his charge to a jury. If this be so, and no one can doubt it, how great must have been the prisoner's incentive to flight when he was advised by mother, step-sister, and a friend that he would never be allowed to stand his trial, but would be hung on the spot. Wills on Cir. Ev., p. 89. Very different, however, was his

Opinion.

conduct while in prison, after all fears of the mob had passed away; when, although he had been provided by a fellow prisoner with the means of making his escape, he sent for his counsel and handed the tools over to him.

And then as to his conduct, what is there in it except his flight, which has already been explained, that could be objected to? From Thursday about sundown to the time of the attempted arrest he had been in North Carolina several miles from the scene of the inquest, and for aught that appears in the record, knew nothing of it, and therefore could not be expected to be found among those who were in pursuit of the criminal.

But where is the proof of either opportunity or means? Is it anywhere shown by a track or otherwise that he was ever nearer than a half mile of the scene of death? or is it anywhere shown that the killing was done with a pistol rather than a gun? On the contrary, is it not patent from the testimony of all three of the witnesses who testify on the point that they thought the report which they heard was produced by the discharge of a gun, and not of a pistol. Indeed, while all of them say it was produced by a *gun* or a pistol, the witness Smith says that "he took it to be the report of a *rifle* fired by some hunter."

Now in the absence of all these inculpatory circumstances, without a single circumstance to connect him with the killing, with the track of the only person who seems to have been walking with a woman indicating a different person, ought we to infer from the mere facts that he was the last person seen with the deceased at a distance of one and a half miles from the spot where the body was found and has failed to give an account of the circumstances under which he left her, and the fact that he was seen a short time after *the supposed time of the killing* on the road which leads by, and within 154 yards of the place where the body was found, that he was the murderer?

Opinion.

We think not. These circumstances, in our judgment, do make out a case of grave suspicion, but do not prove beyond a doubt that the prisoner was the murderer.

It follows that the judgment of the circuit court of Carroll must be reversed and the case must be remanded for a new trial to be had therein.

LACY, J., and FAUNTLEROY, J., dissented.

JUDGMENT REVERSED.

Wytheville.

TAYLOR v. COMMONWEALTH.

JULY 6th, 1893.

1. **HOMICIDE—Grand Jury—Foreman**—Objection that grand jury was not constituted, and foreman not selected and sworn, as required by law, cannot be raised for first time in the appellate court, but must be by plea in abatement.
2. **VENIRE FACIAS—Record**.—It appearing that the *venire* was issued by order of the trial court, *held*, no error that it is not made part of the record.
3. **EVIDENCE—Previous Assault**.—On trial for murder, testimony that about three weeks before the homicide the bed of the deceased was fired into, *held*, admissible, where prisoner several times mentioned the firing in a manner indicating he had done it himself, or procured it to be done.
4. **IDEM—Uncommunicated Threats**.—Though after the homicide prisoner absconded, the exclusion of uncommunicated threats against him, *held*, not error.
5. **IDEM—Rumor—Flight**.—General talk in the community that if certain persons found prisoner they would kill him without attempting to arrest him, *held*, inadmissible on trial for murder to rebut the fact of his immediate flight and concealment and endeavor to leave the State.
6. **IDEM—Indictment against Another**.—It is not error to exclude as evidence an indictment against another person for the same offence.
7. **VERDICT—Affidavits of Jurors**.—The affidavits or declarations of jurors showing that they acted on evidence other than that adduced before them at the trial, cannot be used to impeach the verdict.
8. **MISCONDUCT OF JURY**.—Upon trial for murder, cartridge hulls found at the scene of the homicide have been introduced by the prosecution, and prisoner's Winchester rifle, with shells fired from it during the trial, has been introduced by him to show that the plunger struck the shells differently from those introduced by the prosecution; and the jury were permitted, without objection, to take the rifle and shells to their room; *held*, it was not misconduct in the jury to take it apart and examine the plunger and ascertain that they have been recently tampered with and

- fixed so as to explode the cartridge differently from those put in evidence by the prosecution.
9. INSTRUCTIONS—*Reasonable Doubt*.—It is not error to strike out the words, “to doubt is to acquit,” from an instruction where the law of reasonable doubt was given in its most favorable form for the prisoner. *Tucker’s Case*, 88 Va., 20.
 10. IDEM—*Inferences*.—It is not error to refuse to instruct the jury that no inference can be drawn from prisoner’s failure to introduce any evidence to show where he was on the day of the homicide, where it is in evidence that he told a witness that he was at that time in another State, as instructions not applicable to the evidence, are inadmissible.
 11. QUESTION UNANSWERED.—Assignment of error in refusing to allow a witness to answer a certain question is unavailable in the appellate court where the record does not show what the answer would have been.
 12. CASE AT BAR.—The evidence in the record warrants the verdict of guilty of murder in the first degree.

Error to judgment of circuit court of Wise county, rendered September 10, 1892, upon a verdict of a jury convicting the plaintiff in error, M. B. Taylor, of murder in the first degree of one Ira Mullins, and sentencing him to be hanged by the neck until dead on December 16, 1892. Opinion states the case.

Duncan, Miller & Alderson, for plaintiff in error.

Attorney-General R. Taylor Scott and *E. W. Fulton*, for commonwealth.

FAUNTLEROY, J., delivered the opinion of the court.

The record of the proceedings of the trial court in this case, to be reviewed by this court, presents no question of the *corpus delicti*.

About 9 or 10 o’clock in the morning of the 14th day of May, 1892 (Saturday), *Ira Mullins*, a helpless paralytic who had to travel in a wagon, started in a wagon drawn by two horses, and accompanied by his wife and fifteen-year-old son,

Opinion.

John H. Mullins, and John Chappel, Greenbury Harris, Wilson Mullins, and Jane Mullins, from the house of Wilson Mullins on Elk Horn, in Kentucky, near the Virginia line, to go to the home of the said Ira Mullins, in Wise county, Virginia. When they had crossed the State line, and had got about half a mile from Pond or Pound Gap, on this side of top of the mountain about one-fourth or one-half of a mile, they were fired on, in the public highway, in the county of Wise, from a blinded and barricaded ambush, some twenty or twenty-five steps from the road; and the said Ira Mullins and his wife and John Chappel, Greenbury Harris, and Wilson Mullins were all five instantly killed, and the horses to the wagon were also killed. The boy, John H. Mullins, started to run as soon as the firing began, and as he ran, a bullet grazed his body and cut his suspenders behind and nearly cut them in two. Jane Mullins, the wife of Wilson Mullins, says she was along when Ira Mullins and the other persons were killed; and that she saw three men standing some twenty or twenty-five steps from the wagon, and halloed: "Boys, for the Lord's sake don't shoot any more; you have killed them all now." They replied: "God damn you, take the road and leave, or we will kill you." Ira Mullins received eight shots, and was instantly killed as he lay in his wagon. Thus, as the record shows, were five persons, travelling upon the highway in Wise county, Virginia, at mid-day on Saturday, the 14th day of May, 1892, waylaid and cruelly murdered and hurried into eternity without a moment's warning or apprehension, by dastardly assassins crouching on the roadside in a prepared ambush for the bloody and brutal deed.

Who perpetrated this dark crime—this inhuman and wholesale massacre of innocent and unsuspecting men, women, and children, travelling peacefully upon the public highway in Wise county, Virginia, at mid-day on the 14th day of May, 1892?

Suspicion pointed to M. B. Taylor, the plaintiff in error,

who had fled from his home, and after concealing himself for a time, was endeavoring to make his way to Florida, when he was arrested. At the August term, 1892, of the county court of Wise county, a special grand jury impanelled for the term of the court, and sworn as a special grand jury of inquest in and for the county of Wise, after receiving their charge retired to their room to consider of their presentment and indictment, and returned into court, having found the following indictment, to wit: An indictment of the commonwealth against M. B. Taylor for the murder of Ira Mullins, endorsed "a true bill," and signed by J. M. Wampler, foreman. Which said indictment was entered of record in the said court, and the accused was placed at bar for trial. Taylor, the accused, offered a plea in abatement, which was refused by the court; he demurred to the indictment, and the demurrer was overruled; he then elected to be tried in the circuit court of Wise county, and he was remanded for trial to that court. He was tried in that court at the September term, 1892, by a jury of his peers from the vicinage, and found guilty of murder in the first degree, as charged in the said indictment, and sentenced by the court to be hung on the 16th day of December, 1892. He moved an arrest of judgment, and to set aside the verdict because contrary to the evidence, and, in the course of the trial took *twelve* bills of exceptions to the rulings of the court. These motions were denied, and a writ of error and *superse-deas* was applied for and obtained from one of the judges of this court.

We have now to review the proceedings of the trial courts below, and to determine whether the plaintiff in error has been lawfully tried and convicted of the awful and atrocious crime of which he has been found guilty by the jury and sentenced to death by the court; whether the evidence in the record warrants the verdict of the jury, and whether the accused, from the beginning to the end of his trial, has been allowed all the safeguards which the law of Virginia throws around

Opinion.

her citizens when indicted, arraigned and tried at the bar of her criminal justice.

The petition of the plaintiff in error represents that he is aggrieved in the following particulars, viz: "1. Because the said supposed grand jury which returned the said supposed indictment against petitioner was not constituted as required by law, and J. M. Wampler, who signs and returns said supposed indictment "*a true bill*," was not selected and sworn as foreman of said grand jury as required by law." This assignment of error is not well taken. The objection is made for the first time here; the defect, if any, should have been taken advantage of by plea in abatement, but it sufficiently appears by the record that John M. Wampler was the foreman, for the court received from the grand jury the indictment signed by him as such, and it moreover appears by the record that they were all duly sworn. The *second* and *third* and *ninth* assignments of error were abandoned in court and withdrawn. The fourth assignment of error is that no venire was issued directing the sheriff to summon the jury from a list furnished by the court for the trial of petitioner, &c. This is without merit. The venire can only become part of the record by bill of exceptions, and the record shows that the venire was issued by order of the court, and this is all sufficient.

Fifth. "The court erred in permitting the witness, Germima Harris, to testify that about three weeks before the killing of Ira Mullins his bed was fired into," &c. The fact that Ira Mullins' house and bed in which he was lying was fired into about three weeks before the killing, was important, material, and proper evidence in view of the testimony of sundry witnesses that the prisoner, over and over again, mentioned it in a way showing that he had done it himself or had procured it to be done. He said to witness, Noah Hubbard, "Ira Mullins offered \$100 to have me killed on *Saturday*, and his bed was shot into on *Sunday*, but I was over in Kentucky." He said to witness, Dock Swindall, "Sometime after he had of-

ferred the reward to have me killed, *somebody* shot into his bed, but it wasn't me, and laughed." His declarations to three other witnesses, about the shooting into the bed of Ira Mullins to the same effect, made the evidence of the fact of the shooting into the bed of Ira Mullins admissible.

Sixth. "The court erred in not allowing the witness, John H. Roberson, to answer the question propounded to him, as shown in bill of exception No. 2." The court very properly refused to permit the witness, John H. Roberson, to give in evidence *uncommunicated* threats by McFall and others against Taylor made after the killing of Ira Mullins and but shortly before Taylor's trial. But it does not appear what the answer to the question would have been, and it cannot be said that he was injured by the ruling to reject it, which must affirmatively appear.

Seventh. "The court erred in refusing to allow the witness, John H. Roberson, to answer the question propounded to him, as shown in bill of exception No. 3," &c. The witness answered this question, "It was the general talk in that community that if McFall and others found Taylor that they would kill him without attempting to arrest him." This general talk about the awful tragedy which had been enacted, could not rebut the fact of the prisoner, Taylor's immediate flight, concealment, and attempt to get to Florida; and the court did not err in refusing to let it go to the jury to rebut the fact in the case: that the "wicked fleeth when no man pursueth."

Eighth. "The court erred in allowing the witnesses, Clifton Roberson and Floyd Branham, to testify, and the jury to consider their statements, because said testimony tended to contradict the testimony of Mrs. Mary Roberson, a witness introduced by the commonwealth on said point." It passes all understanding, how testimony discordant among the witnesses for the prosecution could injure the prisoner; and the testimony of these witnesses was admissible on the credibility of the *alibi* set up by the prisoner.

Opinion.

The ninth assignment was abandoned and withdrawn.

The tenth assignment is set forth in the sixth bill of exceptions: "The jury was then withdrawn from the court-room, and the witness, Henry Hall, stated: 'The words, as I remember them, was Dr. Taylor told me that this woman, the wife of Henry or Talt Hall, was living at Ira Mullins', and I told him if that was the case, by watching the house of Mullins he could tell whether either of the Halls came in there or not.' In this connection, counsel for the defence, in response to question whether they proposed to prove that said woman was, in fact, at Mullins' house, avowed that they could and would only prove, if permitted, that there was about that time a loose woman staying with Ira Mullins, whose name they could not show; but the court refused to permit said statement to go to the jury." What relevancy the excluded statement could have had is not discoverable; and it was properly rejected.

The eleventh assignment is: The court erred in refusing to permit the indictment preferred by the grand jury and then pending in the county court of Wise county, against Henry Adams for the murder of Ira Mullins, to go the jury and be considered by them. The record of an indictment against Henry Adams was unconnected with and foreign to the issue between the accused, B. M. Taylor, and the commonwealth; was *res inter alios acta*, and improper evidence, which was not admissible to go to the jury.

The twelfth assignment of error is based upon the eighth bill of exceptions: "That upon the trial of this cause the commonwealth introduced in evidence two cartridge hulls, 45-75; and the defendant introduced in evidence a Winchester rifle which shot a 45-75 cartridge, and proved that said rifle was the gun of the defendant Taylor. And the defendant also introduced in evidence four 45-75 cartridge hulls, and proved by John S. Wright that the four cartridges were shot by him out of the Taylor gun during the present trial. At the time the gun was introduced it was apparently in shooting

Opinion.

condition, and was not taken to pieces, in whole or in part, in the court-room. Shortly after the jury retired to their room to consider of their verdict they sent down to the court to know if they could have the gun; whereupon the court asked counsel on both sides if there was any objection to the jury having the gun in their room during their deliberation, and there was no objection from either side. The gun was then sent to the jury; and after the jury returned their verdict the defendant moved the court to set aside said verdict and arrest judgment thereon, because, as claimed, that in their room, in the absence of the prisoner, the jury took said gun to pieces and examined the plunger; and in support of said motion tendered the affidavit of William Wolfe, P. Debusk, and Elisha Tate, which is in the words and figures following, viz:

“We, the undersigned, hereby state that we were members of the jury that returned a verdict of guilty of murder in the first degree against M. B. Taylor, and that after we took the Winchester rifle to our jury room we took the same to pieces and examined it to see whether or not it had been recently tampered with, and especially to see if what is called the plunger, being the piece which strikes the cartridge and causes the explosion, had been changed in any way since the shooting; and upon such examination we reached the conclusion that the gun had been tampered with recently.”

Then follows the affidavit of J. M. Mills, another juror, in the same words and to the same effect, adding: “Which examination caused me and E. P. Graham, to my own knowledge, to find a verdict of guilty, while, if we had not made such an investigation, we would not have found such a verdict, &c.”

Then follow the affidavit of Wilson Holbrook, the sheriff of Wise county, and the affidavit of one John A. Miller, that the jury did examine the gun, and that the plunger is now in the gun differently from the way they usually are in Winchesters, &c.

Opinion.

There is no legal evidence in the record that the gun was either taken to pieces, or that the jury acted on what they saw. The general rule is that the affidavit of a juror, and much less his *declaration*, attacking or impeaching the verdict which he has rendered, is not admissible and cannot be considered by the court. *Howard v. McCall*, 21 Gratt., 205; *Commonwealth v. Bull*, 14 Gratt., 628; *Read's Case*, 22 Gratt., 947, and this is the English rule. But in this case the affidavits of the jurors, even if admissible, prove no misconduct on the part of the jury, nor any ground for the motion to the court to set aside the verdict. The gun was introduced in evidence by the prisoner, and the four cartridge hulls fired from that gun, during the trial, by one of the prisoner's witnesses, were put in evidence by the prisoner to show the jury that they were struck by the plunger *in his gun* differently from the two cartridge hulls which the prosecution had put in evidence as they had been picked up on the scene of the massacre. The gun was given to the jury in their room, without objection and by consent, and there is no exception on the ground that the gun was taken into the jury room. The court did not tell the jury how they should look at, examine, or consider the gun. The jury had the right to take the gun apart, and to examine the *plunger* to see (as they did see plainly) that the gun and the plunger had been recently *tampered with*, and fixed so as to strike and explode the cartridges differently from those which had been used by the murderers, and put in evidence by the commonwealth. *Davis v. State*, vol. 17 S. E. Reporter, p. 292.

The prisoner's gun and the four cartridge hulls fired from it, during the trial, by one of the prisoner's witnesses to show that the plunger in *that gun* struck the cartridges differently from the cartridge which had done the fiendish work of the cowardly assassins in their ambush, *were put in evidence by the prisoner*; but the dumb witness of the gun itself mutely convinced an intelligent and scrutinizing jury that the plunger in

that gun had been recently tampered with and fixed for the occasion of the trial.

The thirteenth error assigned is the refusal of the court to instruct the jury that they could draw no inference from the prisoner's failure to introduce any evidence to account for his whereabouts on the awful day of the murder of five peaceable and defenceless persons in the public highway, although it was in evidence that he had told the witness, Branham, that he was at that time "waiting on some sick folks on the other side in Kentucky," or from his utter failure to explain the many other suspicious circumstances that surrounded him. This instruction, as asked for, is vicious, and it was properly refused by the court, who had already in two preceding instructions told the jury that, "in the eyes of the law every man is presumed to be innocent until he is proven guilty, and not only is the burden of proving the guilt of a person charged with crime, on the commonwealth, but to warrant a conviction the guilt of the accused must be proved to the exclusion of every reasonable doubt."

The fourteenth assignment of error is the modification of an instruction asked for by the prisoner by the elimination therefrom of the phrase, "the court tells you that to doubt is to acquit," and the giving by the court to the jury, "The court further tells the jury that circumstances of mere suspicion are not sufficient to warrant a verdict of guilty, but before you can convict the prisoner you must be satisfied from the evidence not only that the circumstances are consistent with the prisoner's guilt, but they must be satisfied from the evidence that the facts are such as to be inconsistent with any other rational conclusion than that he is guilty." The law of *reasonable* doubt was, by this instruction, given in its most favorable form for the prisoner. In *Tucker's Case* (reported in 88 Va.), Lewis, P., says, in quotation marks, it has been said, "to doubt is to acquit," but this follows a clear and emphatic

Opinion.

insistence, that *the doubt* must be a reasonable doubt of the sufficiency or certainty of the evidence of guilt; and in the case of *Williams v. Commonwealth*, 85 Va., 609, Judge Lacy delivering the unanimous opinion of the court, said, in substance, that *the doubt* must not be an arbitrary or unreasonable doubt, or a doubt of immaterial and non-essential circumstances, but must be a reasonable doubt of some fact or facts in the evidence, essential for the jury to believe to warrant a verdict of conviction.

The fifteenth assignment of error is set forth in the eleventh bill of exceptions, which certifies: "When, as a matter of fact, no reference had been made during the progress of the case to the prisoner's failure to testify in his own behalf, but the prisoner, by his counsel, urged the court to give the instruction—"the court instructs the jury that the failure of the defendant to testify in his own behalf creates no presumption against him"—the court then, at the urgent request of the prisoner, by his counsel, gave the said instruction to the jury, stating to the jury that it was given at the request of the counsel for the prisoner.

At the same time that the foregoing instruction was offered the following instruction was asked for by the prisoner, by his counsel: "The court further tells the jury that they should not draw any inference against the prisoner because he failed to produce witnesses from the State of Kentucky to show where he was on the day of the killing." This last instruction the court refused to give. This assignment of error is not well taken. The instruction, number one, was given on the prisoner's own motion and urgent insistence; albeit, that no reference had been, nor properly could be, made to the prisoner's failure to testify in his own behalf; and the instruction number *two*, asked the court to invade the province of the jury, and to tell them that they could not draw any inference whatever from the failure of the prisoner to even attempt to do what he told the witness Branham—that he "could prove

Opinion.

directly where he was that day—waiting on some sick folks on the other side in Kentucky.” He did not disclose the names of any pretended witnesses, nor prove, nor state his inability to procure any witness or testimony from Kentucky. Instructions must apply the law to the evidence before the jury; and they must be conformed and confined to the evidence. These instructions did neither.

The sixteenth assignment is that “the court erred in refusing to set aside the verdict of the jury because the same is contrary to the evidence.” A careful scrutiny and anxious consideration of the evidence in the record leaves no doubt in the mind of the court of the guilt of this prisoner and the correctness of the verdict of the jury, and a critical review of all the proceedings of the trial court, at every stage and in every particular, constrains us to affirm the judgment pronounced upon that verdict, and to vindicate the majesty of the violated law. The trial of the prisoner was presided over and conducted by a careful and conscientious judge, whose rulings on all points were correct, and a jury of twelve honest and intelligent men from the vicinage, qualified and free from exception, after seeing face to face and hearing the witnesses, *one and all*, have found the prisoner, M. B. Taylor, guilty of murder in the first degree. In this court the case must be considered as on a demurrer to evidence; and a simple statement of the evidence will show the prisoner’s guilt conclusively and beyond a rational doubt. Of the *seven* in the party of unarmed and helpless men, women and children that received the murderous volley from the ambush only fifteen or twenty-five steps from the roadside, at midday of the 14th of May, 1892, only *two* escaped sudden and instantaneous death. John H. Mullins, the fifteen-year-old son of Ira Mullins and his wife (both of whom were killed), ran from the scene at the first fire, and did not see any of the persons who did the shooting, though a shot passed through his clothing and cut his suspenders behind. He proves (as several other witnesses do) that Ira Mullins had

Opinion.

with him in the wagon over \$1,000 in money, which was partly in a belt worn by his wife under her dress, and the residue in a little hand bag in the wagon. The pocket was cut from the belt and gone, and so was the hand bag gone. Mrs. Jane Mullins, the widow of Wilson Mullins, who was killed, says that she was along when Ira Mullins and the other persons were killed; had got about half a mile from Pond Gap when the shooting commenced from the right side of the road, and above the road; my husband started to run; he got about ten or fifteen steps when I saw him fall, and I saw one of the horses fall. I ran to my husband and found he was shot. I turned him on his side and looked towards where the shooting came from and then started back to the wagon to see if the others were killed. I saw three men standing some twenty or twenty-five steps from the wagon. I hallooed boys, for the Lord's sake don't shoot any more; you have killed them all now. They replied: "God damn you, take the road and leave or we will kill you." I took it to be Dr. Taylor, Henan and Calvin Fleming. I recognized them by seeing them. They had green veils over their faces. I recognized Cal. Fleming's voice, and I also thought I recognized Dr. Taylor's voice. The veils were over their heads and faces. I could see the lower part of their faces. I thought I recognized M. B. Taylor. On cross examination she said she could see the parties who did the shooting from their breasts up. They spoke three or four times; I took it to be Cal. Fleming who spoke first. I have known Dr. Taylor for fifteen years. I am not point-blank certain that it was Dr. Taylor, but I think it was. I recognized Dr. Taylor mostly by his looks, and saw him from the breast up. She could see him from waist up to the place where the veil came. She also said that there was, at the time they were talking to her, a slight cessation of the firing, when the smoke rose so that she could see them.

Dock Swindall testified: I live 150 yards from Ira Mullins'

Opinion.

house. Dr. M. B. Taylor stayed all night at my house on Saturday night before Ira Mullins was killed. He asked me about Ira, and said Ira had offered \$300 for his life. I was in bed when he came to my house. He asked me to get up and come out on the porch, that he wanted to talk to me. He said that sometime after he (Ira Mullins) had offered the reward to have him killed, somebody had shot into his (Ira Mullins') bed, but it wasn't me, and laughed. He said there was aiming to come up big trouble, and that the Fleming boys would not bother me and Colonel Swindall any more; that he had that fixed. He asked me if there was anyone I wanted put out of the way, and I said I don't want anybody put out of the way, unless it was somebody that wouldn't live under the law. And he said what about Martin Sowards and Ira Mullins? Martin Sowards and me had had some trouble. I told him that I thought Ira Mullins was a very good neighbor. I didn't know much about him. He then told me to keep Martin Sowards and Ira Mullins located until the trouble came up; that he would be at my house every other night until the trouble came up.

Another witness, Grigg Swindall, confirms all the testimony of the foregoing witness, Dock Swindall.

Reuben McFall testifies that Dr. M. B. Taylor proposed to him at various times, to go with him and kill the Mullins boys—Ira and Henderson. The last time he mentioned it to me, he said he had gone once by himself and put a man out of the way, and if we boys would not go with him, he would be damned if he could not go by himself and do it again.

Granville Cox testified: Taylor tried several times to get me to go to Kentucky with him to kill Ira Mullins and Henderson Mullins; said he wanted us to go and help clean up the head of Elkhorn. He said, If I don't get it done this year I will do it next year, or have it done.

John Branham testified that he saw Taylor (the prisoner) Thursday after the killing and he had a Winchester gun. He

Opinion.

had been in the habit of carrying a Winchester gun for five or six years. He said he had heard all about the killing; that he was going on to court and have Doc Mullins swear that Ira Mullins had offered Doc Mullins \$250 to have him (Taylor) killed; that Doc Mullins had told him all about it. I did not think he seemed exactly natural—he seemed to talk a little lower than common.

W. M. Gilliam testified, that about one week before the killing he met M. B. Taylor (the prisoner), who told him that Ira Mullins had tried to hire Doc Mullins to kill him; and said he was over in Kentucky, and some one shot in Mullins' bed. He said, The spirits told me of it, and he laughed, and said, you have not got sense enough. This statement is confirmed by Milburn Gilliam and Joe Perkins, who heard the conversation detailed by the witness, W. M. Gilliam.

Miss Mary Branham and Logan Nottingham testified that they saw M. B. Taylor (the prisoner) and Cal. Fleming on Sunday night before the killing, going in the direction of Pond Gap, riding fast and sitting up straight in their saddles.

George E. Roberson and John Venters testified to seeing M. B. Taylor with the Fleming boys, all armed with Winchester rifles, repeatedly just previous to the killing and subsequently thereto.

Time, place, motive, means, opportunity, and conduct, both before and after the killing, all concur in pointing to the prisoner and the Flemings—Calvin and Henan—as the three guilty assassins, who were recognized in the act by Mrs. Jane Mullins. When last seen before the killing, the prisoner was going, under the cover of night, with his *pal*, Calvin Fleming, in the direction of Pound Gap, where Ira Mullins had, unexpectedly to him, gone the day before from his home, where he had told Doc Swindall to keep him located until the trouble came up, and that he would be at his (Doc Swindall's) house every other night till the trouble came up. But the prisoner

Opinion.

never returned again to Doc Swindall's house, because his victim (whom he wanted "*located* till the trouble came up") had gone through Pound Gap into Kentucky. But he, no longer concerned about a loose woman staying at Ira Mullins', turns his attention to Pound Gap, through which he knew Ira Mullins must return to his home, and there, in a lonely spot on the mountain, he fixes an ambush in fifteen or twenty-five steps from the roadside, from which, a few days afterwards, he and the Flemings slaughter Ira Mullins and four other of his party, and kill the horses to his wagon, and rob the money, over \$1,000, which was in the wagon and on his wife's person. At the time and place of the horrible crime he is in close proximity to the scene, and he does not show or attempt to show that he was elsewhere. He told numerous persons that Ira Mullins had tried to have him killed, and he habitually carried a Winchester rifle of 45-75 calibre, the same that were found at the place of the murder. His conduct was that of a guilty man. After the murder he took to the brush with the Fleming boys, and as they were, was always armed; he told Noah Hubbard that he was going "to keep in the brush and keep the law on his side." And after skulking in the woods and resisting arrest with the Fleming boys, armed to the teeth, all of them, for some time, he concealed himself one whole week up stairs in a lumber room at Norton, and his meals were handed up to him through the floor, until he takes passage on a freight car for Florida, and thence to the West, never to return to Virginia. All these and many other circumstances pointing powerfully to his guilt are wholly unexplained, and they are supplemented by the direct testimony of Mrs. Jane Mullins, an eye witness to the killing, who recognized the prisoner and the Flemings, at the distance of only a few steps, both by seeing them from their waists up, and by their voices as she parleyed and pleaded with them not to shoot any more. She had known the prisoner for fifteen years, and was well

Opinion.

acquainted with the Fleming boys. The verdict of the jury is not only supported by the evidence, but it is demanded by the *suprema lex*—the safety and civilization of society. The trial was, in all respects, proper, and we affirm the judgment of the circuit court of Wise county under review, and remand the case for further proceedings in said court according to law.

RICHARDSON, J., dissented.

JUDGMENT AFFIRMED.

Wytheville.

VIRGINIA DEVELOPMENT CO. ET AL. v. CROZER IRON CO. ET ALS.

JULY 6th, 1893.

1. CONSTITUTIONAL LAW—*Special legislation*.—Code § 2486 giving liens to persons furnishing supplies to a manufacturing corporation on all its property, superior to deeds of trust, &c., executed since March 21, 1877, is not contrary to amendment 14 to the constitution of the U. S. as being special and class legislation.
2. CONSTRUCTION OF STATUTES.—Liens for supplies given, by § 2485, priority over deeds of trust, &c., executed since March 21, 1877, are not restricted to deeds of trust, &c., executed between that date and the date of the taking effect of that act, but have precedence over deeds of trust, &c., executed after the latter date.
3. VESTED RIGHTS—*Impairment of charter*.—Section 2485 giving prior liens upon the property of manufacturing corporations for supplies is not invalid as impairing the charter right of such corporation to issue its bonds and secure them, as the charter was taken subject to the general law of the State, and such changes as might be made in that law.
4. GENERAL LAWS—*Private acts—Acts of incorporation*.—Section 4203 excluding from operation of the Code any act passed by the legislature between March 15, 1887, and May 1, 1888, applies only to the acts of a general nature and not to acts of incorporation, which are private acts.
5. SUPPLIES—*What are under § 2485*.—Pig iron furnished a rolling mill, whose business is to manufacture iron, steel, and other metals, is "a supply" within the meaning of § 2485, giving a lien to all persons furnishing fuel and other supplies necessary to the operation of any manufacturing company.
6. LIENS FOR MATERIALS—*Priority*.—Liens given by § 2485 are entitled to precedence as among themselves according to the times at which they are severally filed under § 2486, that first filed taking preference.

Appeal from decree of hustings court of city of Roanoke rendered in the chancery cause wherein the Virginia Develop-

Statement—Opinion.

ment Company was complainant and the Roanoke Rolling Mill, the Pocahontas Coal Company, and the Crozer Iron Company were defendants. From the decree in favor of the defendants the complainant appealed. Opinion states the case.

Griffin & Glasgow and *Phlegar, Berkely & Johnson*, for appellants.

Watts, Robertson & Robertson, Penn & Cocke, and *Kean & Lile*, for appellees.

LEWIS, P., delivered the opinion of the court.

This is a controversy between creditors of the Roanoke Rolling Mill Company, one of the defendants in the court below. The main contest is between the Pocahontas Coal Company and the Crozen Iron Company, claiming to be "supply creditors" of the defendant company, on the one hand, and the appellants, mortgage bondholders, on the other. The defendant company was chartered by the legislature of Virginia by an act approved the 2d day of May, 1887, and is authorized by its charter to erect rolling mills, forges, and furnaces, and to manufacture iron, steel, and other metals. It is also authorized by the ninth section of its charter to issue its bonds from time to time, and to secure the same by mortgage or deed of trust upon its property and franchises, including its franchise to be a corporation.

The bonds held by the appellants, amounting in the aggregate to \$25,000, are secured by a deed of trust of the 10th of January, 1890, whereby the company conveyed to a trustee certain real estate, together with all its rights, privileges, and franchises. This deed was duly admitted to record on the 24th of February of the same year.

The claim of the Pocahontas Coal Company for \$6,580 33 is for coal furnished the defendant company for the operation of

Opinion.

its works, and that of the Crozer Iron Company for \$20,911 51 is for pig iron; and for these claims liens were duly filed in the clerk's office of the hustings court of the city of Roanoke, under sections 2485 and 2486 of the Code. The first mentioned company filed its lien on the 23d of February, 1891, and the Crozer Iron Company on the 10th of the ensuing March. Section 2485 reads as follows:

"All conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, storekeepers, mechanics or laborers, and all persons furnishing railroad iron, engines, cars, fuel, and all other supplies necessary to the operation of any railway, canal or other transportation company, or of any mining or manufacturing company, chartered under or by the laws of this State, or doing business within its limits, shall have a prior lien on the franchise, gross earnings, and on all the real and personal property of said company which is used in operating the same to the extent of the moneys due them by said company for such wages or supplies, and no mortgage, deed of trust, sale, hypothecation, or conveyance executed since the twenty-first day of March, eighteen hundred and seventy-seven, shall defeat or take precedence over said lien," &c.

The following section (2486) merely provides how, where, and within what time the lien must be perfected.

1. The validity of this legislation is assailed by the appellants, on the ground that it is unequal and partial; that it is special and class legislation; and in conflict with the fourteenth amendment of the constitution of the United States, which, among other things, provides that no State shall deny to any person within its jurisdiction the equal protection of the laws.

This contention strikes at the root of the statute, and, if sound, the statute, or rather the section of the Code in question, is void, independently of the provision giving precedence to the liens for which it provides over mortgages and deeds of

Opinion.

trust. But we are of opinion, both on principle and authority, that the position is not sound.

That the statute is special in its character—*i. e.*, confined in its operation, so far as the furnishers of supplies are concerned, to those dealing with railway, canal, or other transportation companies, or mining or manufacturing companies, chartered under or by the laws of this State, or doing business within its limits, is obvious from its terms, and is not disputed. But it does not follow that because the statute is special it is invalid. It has been repeatedly decided by the Supreme Court of the United States, in construing the fourteenth amendment, that it is no objection to a statute that it is special, if all persons subject to it are treated alike under the same conditions.

It is, moreover, well settled by the decisions of that court, beginning with the *Slaughter-House Cases*, 16 Wall., 36, that the fourteenth amendment was not designed to limit, and does not limit, what is known as the police power of the States—that is, in the language of the court in *Barbier v. Connolly*, 113 U. S., 27, “the power to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity.”

A familiar instance of the exercise of this power is the statute giving a mechanics’ lien, which is special in its character, and yet its validity has never been judicially denied because its operation is confined to a particular class. The Poor Man’s law is another instance of the same sort. So, in *Barbier v. Connolly*, a municipal ordinance, prohibiting washing and ironing in public laundries between the hours of 10 o’clock at night and 6 in the morning, was sustained, although assailed as unwarranted class legislation, in that it discriminated between laborers engaged in the laundry business and those engaged in other pursuits, and thus denied to the former the equal protection of the laws. So, a statute making railroad

Opinion.

companies, whose tracks are not fenced, liable for double damages for injuries to stock on their tracks, has been held not repugnant to the fourteenth amendment, either as the unlawful taking of property, or as denying the equal protection of the laws, notwithstanding it imposes upon railroad companies a special liability that is not imposed upon other persons. *Missouri Pacific R. R. Co. v. Humes*, 115 U. S., 512; *Minneapolis Railway Co. v. Beckwith*, 129 *Id.*, 26. And many other instances of a similar nature might be mentioned, some of which are referred to in a note to *State v. Goodwill*, 25 Am. St. Rep., p. 884.

A strong case on this point is *Missouri Railway Co. v. Mackey*, 127 U. S., 205. There a statute of Kansas made every railroad company organized or doing business in that State liable for all damages done to any of its employees in consequence of the negligence of its agents or other employees, thus abrogating with respect to railroad corporations the common law doctrine of fellow servants, and leaving it in full force as to all other corporations and individuals. The statute was accordingly assailed as being special and discriminatory, and in violation of the fourteenth amendment, in that it deprived the defendant company of its property without due process of law, and denied to it the equal protection of the laws. But it was held that there was nothing in these objections; that the statute made no discrimination against any railroad company, but treated all alike, and, therefore, that there was no evasion of the constitutional rule of equality in such a case. In the course of its opinion the court, speaking by Mr. Justice Field, said:

"The objection that the law deprives railroad companies of the equal protection of the laws * * seems to rest upon the theory that legislation which is special in its character is necessarily within the constitutional inhibition, but nothing can be further from the fact. The greater part of all legislation is special, either in the objects sought to be attained by it, or in

Opinion.

the extent of its application. * * * Such legislation does not infringe upon the clause of the fourteenth amendment requiring equal protection of the laws, because it is special in its character; if in conflict at all with that clause, it must be on other grounds. And when legislation applies to particular bodies or associations, imposing upon them additional liabilities, it is not open to the objection that it denies to them the equal protection of the laws, if all persons brought under its influence are treated alike under the same conditions."

The same principle was reaffirmed in *Minneapolis Railway Co. v. Beckwith*, 129 U. S., 26, which case was similar to *Missouri Pacific R. R. Co. v. Humes*, *supra*. And in that case it was again declared that the fourteenth amendment, broad and comprehensive as it is, was not designed to limit the police power of the States, and that the nature and extent of legislation upon any subject falling within that power must necessarily depend upon the judgment of the legislature.

These decisions, and the reasons upon which they rest, when applied to the present case, so fully meet the objections that have been urged to the legislation in question, as to render further discussion of the subject unnecessary. The statute makes no discrimination against any corporation brought under its influence, but treats all alike under similar conditions; and that is decisive of the question. With the wisdom or unwisdom, the justice or injustice, of the statute we have nothing to do. It was for the legislature to say whether its operation should extend to all persons and corporations, or to those corporations only which are specially mentioned; and the discretion of the legislature in the matter is not subject to judicial interference. *New York, &c., Railroad Co. v. Bristol*, 151 U. S., 556, 570.

2. It is contended, however, that section 2485 of the Code, which went into effect along with the Code on the 1st day of May, 1888, impairs the charter-right of the Rolling Mill Company to issue its bonds and to secure the same, and that this

Opinion.

cannot be lawfully done otherwise than by the exercise of the reserved right to alter or amend the charter, which must be done, if at all, by a special act of the legislature having that object in view.

It is true that, according to the ruling in *Fidelity Trust Co. v. Shen. Valley R. R. Co.*, 86 Va., 1, there was no valid "supply-lien law" in Virginia before the Code was enacted; but a sufficient answer to the position of the appellants is that the company took its charter subject to the general law of the State, and to such changes as might be made in that law. *Penn. R. R. Co. v. Miller*, 132 U. S., 75. "It cannot be successfully contended," said the court in the Mackey case, "that the State may not prescribe the liabilities under which corporations created by its laws shall conduct their business in the future, where no limitation is placed upon its power in this respect by their charters." So, also, when the appellants took the bonds of the company, which were executed and secured in 1890, after the enactment of the Code, they were presumably cognizant of the law then in force giving a prior lien in cases of this sort, and they accepted the security with that legal incident adhering in it. *Provident Institution v. Jersey City*, 113 U. S., 506. So that no amendment of the charter was necessary to bring the company within the operation of that law, nor does section 2485 of the Code operate, nor was it designed to operate, as an amendment of the charter. *Anderson v. Commonwealth*, 18 Gratt., 295.

Judge Cooley, in treating of the police power of the States, after observing that all contracts and all rights are subject to this power, says:

"Perhaps the most striking illustrations of the principle here stated will be found among the judicial decisions which have held that the rights insured to private corporations by their charters, and the manner of their exercise, are subject to such new regulations as from time to time may be made by the State with a view to the public protection, health, and

Opinion.

safety, and in order to guard properly the rights of other individuals and corporations. Although these charters are to be regarded as contracts, and the rights assured by them are inviolable, it does not follow that these rights are at once, by force of the charter contract, removed from the sphere of State regulation, and that the charter implies an undertaking, on the part of the State, that in the same way in which their exercise is permissible at first, and under the regulations then existing, and those only, may the corporators continue to exercise their rights while the artificial existence continues. The obligation of the contract by no means extends so far; but, on the contrary, the rights and privileges which come into existence under it are placed upon the same footing with other legal rights and privileges of the citizen, and subject in like manner to proper rules for their due regulation, protection, and enjoyment." Cooley, Const. Lim. (6th ed.), 709. See, also, *New York, &c., Railroad Co. v. Bristol*, 151 U. S., 556, 567.

3. The result of these views is that the act itself incorporating the Rolling Mill Company was not affected by the subsequent enactment of the Code, although a new regulation is prescribed by the Code, under which the rights of other persons are guarded and protected, and the rights and privileges granted by the charter to the company are to be exercised or enjoyed. It is hardly necessary, therefore, to notice the point made by the appellants as to the provision of section 4203, excluding from the operation of the Code any act passed by the legislature between the 15th of March, 1887, and the 1st of May, 1888. It may be as well, however, to say that the act of incorporation is a private one, and that the acts referred to in that section are acts of a *general nature*. This is obvious not only from the title of the Code, but from the language of section 4202, which is *in pari materia*.

4. Another point contended for is that supply liens are given precedence by section 2485 only over those mortgages and deeds of trust which were executed between the 21st of March,

Opinion.

1877, and the 1st of May, 1888. But this was not the intention of the legislature, although its meaning, it must be admitted, is rather awkwardly expressed. The language of the section is that "no mortgage, deed of trust, sale, hypothecation, or conveyance executed *since* the 21st day of March, 1877, shall defeat or take precedence over said lien." This applies to mortgages, etc., executed as well after the enactment of the Code as before. No reason can be imagined why the legislature should have otherwise intended, and it is not to be supposed that if such had been the intention, it would not have been plainly and unmistakably expressed.

It is unnecessary, therefore, in view of the foregoing considerations, to decide whether, inasmuch as the Rolling Mill Company is not complaining, it is competent for the bondholders, whose debts were contracted subsequent to the enactment of the Code, to deny the validity of the legislation in question; for be that as it may, the result is the same.

5. A more difficult question, and in fact the only one in the case about which we have had any doubt is, whether the pig iron furnished by the Crozer Iron Company is embraced within the term "supplies." The appellants deny that it is. Their contention is that the term embraces only the incidentals of the business, such as oil, waste, fuel, and the like, and not the raw material from which the product of the concern is manufactured. In other words, they draw a distinction between supplies necessary to the operation of the plant and the material operated upon.

The statute gives a lien to "all persons furnishing * * *fuel* and all other supplies necessary to the operation of any * * manufacturing company," chartered or doing business in this State. The question, therefore, is whether pig iron is "necessary to the operation of" a rolling mill whose business it is to manufacture, among other things, iron, steel, and other metals.

The statute is a new one, and has not heretofore been construed in this particular, so that we are without the aid of

Opinion.

authority in construing it. The term "supplies" seems not to have a technical or legal meaning, and it is not clear from the face of the statute what meaning was intended to be attached to it. Numerous witnesses, however, experienced in the business of manufacturing iron, were examined, and the preponderance of this evidence is in support of the ruling of the lower court. Indeed, several of the appellants' own witnesses testify in favor of this view. Thus the witness, Murphy, says pig iron and fuel, in cases of this sort, belong to the same class and stand upon the same footing, and the same opinion is given by several other witnesses on the same side. If this view be correct, then, according to the rule of *ejusdem generis*, pig iron, like fuel, is a "supply" within the meaning of the statute. Many witnesses for the appellees testify to the same effect. The statute, moreover, is a remedial one, and, therefore, to be construed liberally, as has been held in regard to statutes giving liens to mechanics and laborers. *Davis v. Alvord*, 94 U. S., 545; *Flagstaff Silver Mining Co. v. Cullings*, 104 *Id.*, 176. So that, upon the whole, we deem it best to affirm the decree, leaving it to the legislature to remove the obscurity of the statute if, upon its attention being called to the matter, it shall see fit to do so.

We hold, therefore, that section 2485 of the Code is valid and constitutional; that it is not repugnant either to the fourteenth amendment or to anything in the constitution of Virginia, and that both of the "supply liens" in question are paramount to the deed of trust.

6. The decree is also right in giving priority to the lien of the Pocahontas Coal Company over that of the Crozer Iron Company, it having been first filed. In the silence of the statute on the subject, the rule of the common law applies, which establishes liens in the order of their acquisition, the first in order of time standing first in order of rank. 6 Lawson, *Rights & Rem.*, sec. 3093; *Voorhis v. Westervelt*, 43 N. J. Eq., 642; 3 Am. St. Rep., 315. This is not so in regard to me-

Opinion.

chanics' liens, because the statute itself forbids priorities in those cases; and the failure of the legislature to so provide in regard to supply liens indicates its intention to leave the common law rule on the subject unaltered, so far as liens of the latter class are concerned.

DECREE AFFIRMED.

NOTE BY THE REPORTER.—On rehearing of the foregoing cause the court adhered to the above opinion, which had been already delivered by LEWIS, P.

Wytheville.

NORFOLK & WESTERN RAILROAD CO. v. LIPSCOMB.

JULY 6th, 1893.

PASSENGERS—Detention—Loss of Baggage.—Passenger with wife and two children, one very sick, bought at B. tickets to W. and was assured by defendant's officials that a through sleeper was attached to the train. Entering sleeper, he paid for two berths, and was assured by its conductor that it would go through. Suddenly, without notice to him, sleeper was cut loose, and the train went on carrying off his baggage, including the child's clothing and medicine, part whereof was lost. Sleeper was left on the track at night when it was too late to get into a hotel or drug store. This distressing situation was produced by the negligence of the defendant's officials, of whom said conductor was one.

HELD:

Defendant is liable to plaintiff in an action for the retention and loss of baggage, in damages to an amount equal to the value of the property and the time lost, but not to punitive damages.

Error to judgment of circuit court of Washington county, rendered at the April term, 1892. The action was trespass on the case for certain alleged grievances committed by the plaintiff in error against the defendant in error, who was a passenger upon the road of the said plaintiff in error, and who by misdirection embarked upon a coach which was cut out of the train without notice.

Upon the trial the plaintiff recovered a verdict for \$500, and the defendant moved the court to set aside the verdict and grant a new trial, which motion the court overruled and rendered judgment on the said verdict.

Statement—Opinion.

Whereupon the defendant company applied for and obtained a writ of error to this court.

Fulkerson, Page & Hurt, for plaintiff in error.

T. N. Williams and *George W. Ward*, for defendant in error.

LACY, J., delivered the opinion of the court.

This case is as follows: The plaintiff testified as follows: My child had been very sick for two or three weeks, and the doctors advised as soon as we could, as soon as it got better, to move from Big Stone Gap to our home, and on their advice we made this move. I knew the running of the trains—I had traveled it frequently. The S. A. & O. train got into Bristol between five and six o'clock, and the train I expected to go on left somewhere about eleven o'clock that night. We went to the hotel and stayed there until about time for this train to leave Bristol, probably about twenty minutes before schedule time, and then I went to the ticket office and purchased two tickets from the ticket agent, Mr. Bradley. I knew him well, and I asked Mr. Bradley if there was a sleeper going through over the Shenandoah Valley railroad, and he stated that there was a sleeper coming in on the Tennessee road that would go on through, and I purchased these tickets, and he advised me to get on this train, which was already made up on the side track, and remain there until the East Tennessee train came in; that it would be fifteen minutes, may be twenty minutes or twenty-five, till that train came in, and when that train came he stated that the sleeper would be attached at the rear; after it was attached we started back to the sleeper. I had the little boy that was sick and my wife had the baby, so we couldn't carry the bundles and the hand-bag, valise, &c., that we had. We went back through three or four sleepers, I don't remember which, and I inquired at the door of each car for the sleeper

Opinion.

going over the Shenandoah Valley railroad. They said that this sleeper was on this train, to pass on through until "you find it." I think I went through two or more cars, and the third or fourth one was the Shenandoah Valley sleeper. The conductor was standing on the platform of the car just at the door. When we passed out of the first car the train started; as I got into this car (sleeper), it was just moving slowly, I asked if this was Waynesboro Junction sleeper going over the Shenandoah Valley railroad, and will it go through, and the conductor said yes, we are going through. I purchased two tickets for berths, and paid him \$2 apiece for them, numbers 5 and 6, lower berths, and I then showed him the other tickets. I went back into the car with the porter, and he showed the berths to my wife, and she and my family stayed in there, and I started back into the other car to get the bundles out of the train, and found that the train had cut loose from this sleeper and was pulling out of the yard. I remarked to Mr. Jones, the Pullman conductor, "I believe we have gotten left," and he said they had orders to throw out a Washington sleeper, and were throwing it out; that they never left a sleeper with passengers in it, and that the Washington sleeper would remain in Bristol, and that sleeper would go out. I remarked from the exhaust of the engine I thought they were leaving, and he said, No, they are throwing out the empty Washington sleeper; they will back in directly and couple to this sleeper. I am not positive just what I said, but did say from the exhaust of the engine I believe we are left, and then he said: "I will be d—d if we ain't," or something of that kind, and stated that he had been running, I don't know how many years, and had never been left that way before. I asked him what was the best thing to do; if there was a telegraph office there; how could I get this baggage that was taken off; that my medicines and all had been left in the coach, and were taken away on that train. He said you had better go and telegraph and have them stopped. I went to the telegraph office,

Opinion.

and I think he went with me. I telegraphed to the train despatcher that I was left there and had a very sick child, and all the medicine and baggage I had had been carried off on this train.

The following message was admitted to be the message sent :

BRISTOL, 6-21, '90.

Train Desp'r N. & W. R. R., Radford:

I was misinformed here to-night in regard to leaving here on N. Y. sleeper. Was transferred from one car to the sleeper said to go through on No. 2. I have a very sick child and wife here on the yard in a close sleeper. This train No. 2 leaves here with no notice to passengers and takes my baggage, all of the medicine and nourishment I had for my wife and child. I hold my ticket, and will hold the road responsible for damages or spend the last dollar I have suing. My child is very ill, and can't get a thing for him at this hour of night. I have wired conductor to leave things at Abingdon with no reply; to leave them at Glade Spring, and not left them. Can you arrange at any cost, makes no difference how much, to run me and family to point at which these things are left. I am afraid my child will die if he has not the medicine, &c. My doctor came with me to this point, but has gone back. The things spoken of which are mostly needed are in the first-class car next to sleeper—a basket with good many bottles, &c., in it, a small valise and shawl strap, with umbrella—about centre of car. Please have them stopped, and answer this if you please. 3k. a. m.

W. P. LIPSCOMB.

It was also proved that the plaintiff was delayed on the road, and was obliged to change his line of travel at Roanoke and go by Lynchburg and Charlottesville to reach his destination; that his sick child was greatly discomforted, as he had no change for him, and he was sick. At Lynchburg the plaintiff secured some clothing and some food.

Opinion.

The defendant contradicted the testimony of the plaintiff as to the misdirection and misinformation given at Bristol to the plaintiff, but under the law in this State we must consider the evidence as upon a demurrer to evidence by the defendant below, the plaintiff in error here, and so considered. It appears that a passenger with his wife and sick child, and another child an infant, applied at Bristol to the company's agent for a ticket for himself and family to Waynesboro Junction, a point on the defendant's road, obtained it, and paid for it, and was informed that a sleeper was on the train approaching, and that it would go through, and that there were two sleeping-car berths vacant which he could get—Nos. 5 and 6. That upon the arrival of the train he went into this sleeper, obtained and paid for the two berths, and took possession of them. Whereupon, without notice to him, the said sleeper was cut loose and left standing in the night time on the siding, while the train upon which he had engaged and paid for his passage sped on its way without him. The hour was so late that he could not get into the hotel nor into any drug store, and he was left in a very painful situation. That, under the circumstances detailed, his baggage containing the sick child's clothing and medicine was carried off, and the valise containing the clothing and medicine was lost and never recovered. That this was caused by the misdirection and negligence of the company's officers is plain.

The conductor of the sleeping car attached to the defendant's train was an officer of the company, and as to all passengers in his car was such an officer of the company as represented the company, and the company is responsible for his negligence. *Williams v. Pullman Car Co.*, 33 Am. & Eng. R. R. cases 414; *Penn. Co. v. Roy*, 102 U. S., 452. And there can be no question that the company is liable to the plaintiff in this action for damages for the injury sustained.

But it is not clear that the company can be held to respond in any other measure of damages than such as are compensa-

Opinion.

tions for the actual injury sustained. The record discloses that the officers of the company were themselves mistaken, *negligently mistaken* it may be conceded, yet we perceive in the record no indication of any malicious purpose or evil intent. It was an honest mistake, and one much regretted by those in fault as soon as it occurred, and disclaimed by the company, and everything within reasonable bounds done to alleviate the unfortunate condition of the plaintiff. Such baggage as was discovered was put off at a station and reclaimed by the company's servants as the train passed on which the plaintiff ultimately travelled. The valise was lost and should be paid for, but that does not appear otherwise than as an accident.

But there was no insult, no disrespect, either before nor after the sleeper was cut loose. In this respect this case is to be distinguished from the late case in this court decided at this term, of *Norfolk and Western Railroad Co. v. Wm. M. Anderson*, ante p. 1.

The court instructed the jury under these circumstances as follows:

The plaintiff tendered the following instructions:

"The court instructs the jury that in this action they may find against the defendant *such punitive damages as in their judgment may be proper, provided they believe from the evidence that the injury complained of by the plaintiff in his declaration accrued through the wilful negligence and carelessness of the defendant, its agents and servants*; and the court instructs the jury that for the purposes of this case the conductor of the sleeping car must be treated as a servant of this, the railroad company," which instruction was objected to by the defendant, but the court overruled said objection and gave the said instruction in the words above set forth, to which action of the court the defendant excepted, which is its first exception. And thereupon the defendant tendered four instructions in the words and figures following, to wit:

Opinion.

First.

The court instructs the jury that negligence cannot be presumed, but must be proven, and that the burden of proving negligence by a preponderance of evidence rests upon the party alleging the negligence, and therefore unless the jury believe from the evidence that the defendant negligently failed to attach the sleeping car in question to the train in question they should find for the defendant.

Second.

The court instructs the jury that if they find from the evidence that the plaintiff was delayed in his journey by the negligent failure of the defendant to attach the sleeping car in question to the train in question, then they are limited in fixing the damages to the actual damages sustained by the plaintiff, which actual damages must be such as are laid in the declaration, and can only find for the plaintiff—

First. Such sum as may be proved to have been expended in completing the journey in question, after deducting therefrom the value of the railroad tickets from Roanoke to Waynesboro Junction, still held by the plaintiff; and,

Second. The amount expended in having the child cured of its illness; and,

Third. The value of the time for which the plaintiff was delayed in reaching his destination, estimating the said time at what the time of the plaintiff was ordinarily worth. But the jury can make no allowance for the amount expended in having the child in question cured of its illness unless they believe from the evidence that the sickness of the said child was caused by the delay of the defendant company in carrying the plaintiff upon said journey.

Third.

The court instructs the jury that if they believe from the evidence that the plaintiff, at the time in question, purchased

Opinion.

railroad tickets from the defendant, and if they believe from the evidence that the defendant's train for which said tickets were purchased went forward, yet if they believe from the evidence that the sleeping car in question was left at Bristol by negligence of the defendant company, they cannot find for the plaintiff unless they further believe from the evidence that the plaintiff secured tickets upon the said sleeping car before the departure of said train from Bristol.

Fourth.

And the court instructs the jury that in order to find the defendant guilty of wilful negligence it must appear that the act of the defendant was not in the nature of a mistake, but was an intentional act on the part of the defendant with the intention of delaying the plaintiff in the prosecution of his journey.

And the court gave the first instruction offered by the defendant, and modified the second instruction, and refused to give the third instruction, and modified the fourth instruction, and gave the second and fourth instructions as modified, which were in the words and figures following, to wit :

Second Instruction as modified and given.

The court instructs the jury that if they find from the evidence that the plaintiff was delayed in his journey by the negligent failure of the defendant to attach the sleeping car in question to the train in question, then they are limited in fixing the damages to the actual damages sustained by the plaintiff, which actual damages must be such as are laid in the declaration, and can only find for the plaintiff—

First. Such sum as may be proved to have been expended in completing the journey in question, after deducting therefrom the value of the railroad tickets from Roanoke to Waynesboro Junction, still held by the plaintiff; and,

Opinion.

Second. The amount expended in having the child in question cured of its illness; and,

Third. The value of the time for which the plaintiff was delayed in reaching his destination, estimating the said time at what the time of the plaintiff was ordinarily worth.

But the jury can make no allowance for the amount expended in having the child in question cured of its illness unless they believe from the evidence that the sickness of the said child was caused by the delay of the defendant company in carrying the plaintiff upon said journey.

But if the jury should find that the agents of the defendant were guilty of wilful misconduct and thereby caused the plaintiff's delay, then they may find, in addition to these actual damages, punitive or exemplary damages.

Fourth Instruction as modified and given.

The court instructs the jury that in order to find the defendant guilty of wilful negligence it must appear that the act was not in the nature of a mistake, but was an intentional act on the part of the defendant's agent, done with the purpose of misleading the plaintiff.

To which action of the court in modifying the second instruction and refusing to give the third instruction, and in modifying the fourth instruction, the defendant excepted, which is its second exception.

And thereupon the jury retired, and after a time returned a verdict, which verdict is as follows:

We, the jury, find for the plaintiff, and assess the damages at \$500 (five hundred dollars.)

And thereupon the defendant, by counsel, moved the court to set aside said verdict and grant it a new trial upon the ground that the court had erred in its instructions, and upon the further grounds that the said verdict was contrary to the law and evidence, and that the damage found by the jury was exces-

Opinion.

sive, which motion the court overruled and rendered judgment upon said verdict.

Under the circumstances of this case can the defendant be lawfully held to respond in exemplary or punitive damages?

It was said by Judge Staples, speaking for this court in *Borland v. Barrett*, 76 Va. Rep., p. 132: "In a legal sense every unlawful act, done wilfully or purposely, to the injury of another upon slight provocation, is as against such person malicious, and the law so presumes." And this is as strongly as this doctrine could well be stated. It being conceded that this presumption may be rebutted by proof, no malice, nor any evil intent can be presumed from a mistake or misadventure. To state the proposition is to prove it. It is self evident. An absence of evil purpose is an absence of malice. No mere inadvertence, mistake, or accidental occurrence can be malicious, although negligent. And this would seem to be sufficient for this case. And it is scarcely necessary to go into the other question, whether the company is responsible for the malicious act of its employee. In the case of *Lake Shore, &c., Railroad Co. v. Prentice*, 147 U. S. S. C. Rep., 101, Mr. Justice Gray reviews this subject and cites many authorities, among them the case of *Hogan v. Providence and Worcester Railroad*, 3 Rhode Island, 88, 91, which is highly endorsed. When it is said: "We do not see how such damages can be allowed when the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him *particeps criminis* of his agent's acts. No man should be punished for that of which he is not guilty. When the proof does not implicate the principal, and, however wicked the servant may have been, the principal neither expressly nor impliedly authorizes nor ratifies the act, and the criminality of the act is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sus-

Opinion.

tained in consequence of the wrongful act of a person acting as his servant."

In this case the instructions are that the jury could assess exemplary, punitive damages against the defendant for the wilful negligent act of the servant or agent.

This is contrary to the plain principles of justice, and the decided cases are to be contrary. Exemplary or punitive damages do not lie in such a case; the amount of damages is not too large, abstractly considered. But when considered in the light of the evidence in this case, they are much beyond any compensatory basis; there was no hurt, nor pecuniary nor other loss which is proved which can be brought by this evidence to this amount. There was delay, vexation, distressing anxieties, and some loss, but the sum of \$500 could not have been reached upon any other principle than the ascertainment of punitive damages under the erroneous instructions of the court, which cannot be allowed, the transaction involving neither fraud, malice, oppression, or gross negligence, or reckless indifference to the rights of others.

The jury having been misinstructed by the court as to the law of the case, the judgment must be reversed and annulled, and the case remanded to the said circuit court of Washington county for a new trial to be had therein.

JUDGMENT REVERSED.

Wytheville.

KENDRICK v. SPOTTS & GIBSON.

JULY 13th, 1893.

APPELLATE COURT—*Jurisdictional Amount*.—Where suit in chancery is brought to enforce upon land a judgment for more than \$500, and the defendant pleads setoffs, which being allowed, the decree against the defendant is for less than that sum, this court has not jurisdiction of the defendant's appeal from the decree.

Appeal from decree of circuit court of Washington county, rendered May 23, 1891, in a suit in equity wherein John G. Spotts and George Gibson, merchants and partners, trading under the firm name and style of Spotts & Gibson, were complainants, and H. F. Kendrick and M. E. Kendrick were defendants. Opinion states the case.

George W. Ward, Jr., for appellant.

Jones & St. John, for appellees.

LEWIS, P., delivered the opinion of the court.

On the 15th of April, 1889, the appellees, Spotts & Gibson, recovered a judgment by confession in the clerk's office of the circuit court of Washington county against H. F. Kendrick and M. E. Kendrick for \$550, with interest and costs. M. E. Kendrick was the wife of H. F. Kendrick. The judgment was confessed by one Cosby, as attorney in fact for the defend-

Opinion.

ants, in pursuance of a certain paper writing, under seal, executed by them, on the 30th of March, 1889, purporting to be a power of attorney authorizing him to do so.

The bill in the present suit was filed to subject certain real estate, the property of Mrs. Kendrick, to the satisfaction of the judgment; and there is exhibited with the bill a copy of the record in the action at law, in which all the proceedings are fully set out.

Mrs. Kendrick demurred to the bill, and also answered. One of the grounds of demurrer was that the judgment is void, because a warrant of attorney by a married woman to confess judgment is a nullity. In the answer she set up, among other defences, sundry counter claims, aggregating something over \$250, and prayed that the answer be treated as a cross-bill.

The circuit court overruled the demurrer, and by a subsequent decree allowed the defendants certain credits, and ascertained the balance due by them to the complainants, the appellees, here, to be a little less than \$500, including interest.

From this brief statement of the case it is obvious that the appeal must be dismissed for want of jurisdiction. Had the defendants chosen to stand upon their demurrer to the bill, and taken an appeal from the decree overruling the demurrer, which settled the principles of the cause, there could be no doubt of the jurisdiction of this court, for in that case the matter in controversy would have exceeded \$500. But they elected to pursue a different course—that is, to go into a litigation of the merits of the case, and the result was a decree against them for less than \$500, to pay which the land was ordered to be rented.

When the plaintiff appeals in a case of this sort the test of the jurisdiction is the amount of his demand. But when the defendant is the appellant, “the matter in controversy” is the sum decreed against him, and by the payment of which he may discharge himself; so that the amount of the decree de-

Opinion.

termines the jurisdiction in the present case, and not that sum *plus* the aggregate of the disallowed claims set up in the answer. *Lenis v. Long*, 3 Munf., 136; *Umbarger v. Watts*, 25 Gratt., 167; *Hawkins v. Gresham*, 85 Va., 34; *Hannan v. City of Lynchburg*, 33 Gratt., 37.

APPEAL DISMISSED.

Wytheville.

MUMPOWER v. CITY OF BRISTOL.

JULY 13th, 1893.

WATER COURSES—Milldam owners—Injunction.—Owner of dam in stream of water cannot enjoin prior owner of dam above his from damming back the water for purpose of raising a pond sufficient to supply his mill with water for operating his machinery, although such use at times keeps back the water to the extent of depriving the lower owner of water.

Appeal from decree of circuit court of Washington county, rendered May 9, 1892, in the chancery cause wherein the city of Bristol was plaintiff and Wm. H. Mumpower, the appellant, was defendant. The object of the suit was to enjoin the appellant from damming back the water of a natural stream so as to cut off the appellee's supply of water. The circuit court perpetuated the injunction awarded, and the defendant appealed. Opinion states the case.

Fulkerson, Page & Hurt, for appellant.

Hamilton, Rhea & Peters, for appellee.

LACY, J., delivered the opinion of the court.

The bill was filed by the appellee, alleging that it was the owner of a water works dam erected across Mumpower Creek for the purpose of raising a pond of water sufficient to supply the said appellee, the city of Bristol, with water.

Opinion.

That some seventeen years before the erection of its dam the appellant was the owner of a mill dam several hundred yards above, across the said creek, erected and used from that time to the present time for the purpose of raising a pond of water for the purpose of supplying his mill with water to operate the machinery of its water grist mill; that the dam of the said appellant holds back the water so as to deprive it of water at times, and that its rights are thus invaded, and praying an injunction against the said appellant to prevent him from damming back the water of the said stream so as to cut off its supply of water.

The appellant demurred and answered, and denied that the water works dam of the appellee was sufficient to supply it with water, and denied that he had diverted the water of the stream from its natural channel; stated that his parents had used and operated this mill and fixtures for many years, and he himself succeeding them, had operated this mill continuously since 1875, and insisted that he had the right to use the water in such way as was necessary to operate his mill, and denied that he had used the water in any improper manner either to divert it or to pollute it.

The cause came on to be heard upon the depositions taken in the cause and upon the foregoing. The court upon the hearing, being of opinion that the defendant had threatened to pollute the water, and had unreasonably detained the water, conceding his right to use the water for his mill, decreed that the defendant be perpetually enjoined from entirely cutting off or so far diminishing the natural flow of the stream in controversy as that by reason thereof the plaintiff shall not at all times have a reasonable supply of water from the said stream, and that the defendant pay the costs.

From this decree the defendant applied for and obtained an appeal to this court.

The stream in question is a natural stream of water, and

Opinion.

both parties have a natural right to the use of the water of the said stream.

The appellant, W. H. Mumpower, has no right by prescription to obstruct the water of this stream, as his use has not extended to twenty years uninterruptedly in any particular manner adverse and injurious in its nature. No such presumptive right can arise from an adverse use for a less period. *Cornett v. Rhudy*, 80 Va. Rep. 714, and authorities cited.

We have to deal here with the natural right of two riparian owners to the use of the water of a stream. The right of any riparian owner to the use of the water of a running stream is a right inherent in the land as a right *publici juris*. And the right to the use of the water as a general rule is limited to such use as is not inconsistent with a like reasonable use by the other riparian owners on the same stream above and below. But in a controversy between the owners of two dams over the same stream, the proprietor who first erects his dam for a useful purpose has a right to maintain it, as against the proprietors above and below. And to this extent, prior occupancy gives a prior right to such use. It is a profitable, beneficial, and reasonable use, and, therefore, one which he has a right to make. If it necessarily occupy so much of the fall as to prevent the proprietor above from placing a dam or mill on his land, it is *damnum absque injuria*.

For the same reason the proprietor below cannot erect a dam in such manner as to raise the water and obstruct the wheels of the first occupant. He had an equal right with the proprietor below to a reasonable use of the stream; he had made only a reasonable use of it; his appropriation to that extent being justifiable and prior in time, necessarily prevents the proprietor below from raising the water and interfering with a rightful use already made; and it is therefore not an injury to him.

It was decided in the case of *Lincoln v. Chadburne*, 56 Me., 197, that as between proprietors of dams on the same stream,

Opinion.

he has the better right who was first in point of time. In that case it appeared that of three dams, situated within a short distance of each other on the same stream, each erected by or with the consent of the riparian proprietor on whose land it stands, the middle one belonged to the plaintiff, the lower one to the defendant. And the plaintiff's dam was originally erected before the defendant's. Burrows, judge, said:

“The plaintiff having erected his dam before the defendant had made any movement of the sort, had, so far as the defendant was concerned, a perfect right to maintain it perpetually, and to recover for any injury which the defendant might inflict by means of any subsequent erection below him. Unless he abandoned the right, the temporary destruction of his dam, whether by accident or by design, would not enable the defendant to acquire as against him the rights of a prior occupant.”

Such appears to be the nature and extent of the prior and exclusive right which one proprietor acquires by a prior reasonable appropriation of the use of the water in its fall; and it results, not from any originally superior right, but from the legitimate exercise of his own common right, the effect of which is *de facto*, to supersede and prevent a like use by other proprietors originally having the same common right. But the right which is thus acquired is not so absolute as to give him the control of the whole stream, or to deprive other proprietors of the reasonable enjoyment of the privileges to which they are naturally entitled. They may still construct and maintain dams across the stream at any point either above or below his mill, for the purpose of raising a head of water to propel, operate, and work mills of their own erected on the adjoining land, provided that their arrangements are so made that they will not unreasonably withhold and detain the water above, nor throw it back from below, so as to affect, impede, delay, or obstruct the movement and operation of the wheels and machinery of his previously existing mill. *Thurber v.*

Opinion.

Martin, 2 Gray. 394; *Smith v. Agawam Canal Co.*, 2 Allen, 357.

But such appropriation of the stream to mill purposes, upon the principles stated, gives the proprietor a prior and exclusive right to such use only so far as it is actual. If, therefore, he has erected his dam and mill, with its waste ways, sluices, and other fixtures necessary to command the use of the water to a certain extent, and there is a surplus remaining, the proprietor below may have the benefit of that surplus. *Elliott v. Frickbury Railroad Co.*, 10 Cush., 198; *Fuller v. Chicopee Manuf. Co.*, 16 Gray; *Smith v. O'Hara*, 43 Cal., 371. Angel on W. C., § 131. Running water is considered, not as *bonum vacans*, to which the first occupant might acquire an exclusive right; but as public and common, in this sense only, that all that have a right of access to it might drink it, or apply it to the necessary purpose of supporting life, and that no one had any property in the water itself, except in that particular portion, which he might have abstracted from the stream, and of which he had the possession, and during the time of such possession only.

In this case the appellant having first erected his dam and mill, for the useful and lawful purpose for which it was designed, had thus, without acquiring any prescriptive right, acquired the right to a reasonable use of the water for the purposes of his mill, and without the right to pen back the water so far as required for the operation of his mill, his mill would be useless. But he is not entitled to pen back the water to a greater extent than is necessary for his operations. And in this case there is no pretense that he has done this; he has not diverted it nor polluted it; simply penned it back until it came to the necessary height, and this was longer or shorter in time, according to a wet or dry season. The plaintiff was entitled to the surplus only; this he had. The defendant has not polluted the water, nor attempted to do so; and it is clear that the plaintiff had no cause of action if he did

Opinion.

not have enough water; it had a simple remedy by raising its dam; it would then have all the water that the defendant had, all the water the stream afforded. And this it has done, and having raised its dam since this suit was brought, so that by making a dam of sufficient size it will doubtless have a sufficient supply of water, because the defendant, as we have seen, does not destroy nor divert it, but it all ultimately goes on over its dam or through its race and water ways and sluices. It follows that the bill of the plaintiff should have been dismissed with costs, and the said decree having decided otherwise, we are of opinion to reverse and annul the same, and render here such decree as the said circuit court ought to have rendered.

DECREE REVERSED.

Wytheville.

SIMON v. ELLISON & ALS.

JULY 13th, 1893.

CHANCERY PRACTICE—*Parties—Fraudulent Conveyances.*—A suit to set aside a trust deed giving preference to creditors, as fraudulent, can not be maintained without making the beneficiaries parties.

Appeal from decree of corporation court of city of Bristol, in a chancery cause wherein Rodman B. Ellison, John B. Ellison, Henry H. Ellison, and William B. Ellison, partners under the style of John B. Ellison & Sons, and others were plaintiffs, and H. J. Simon and H. E. Jones, as trustee, were defendants. The object of the suit was to annul as fraudulent a trust deed made to secure certain preferred creditors of the grantor, who were not made parties. The circuit court set aside the deed, and the defendant, Simon, appealed. Opinion states the case.

Blanchard & Ashworth, for appellant.

Fulkerson, Pope & Hurt and *St. John & St. John*, for appellees.

LACY, J., delivered the opinion of the court.

The bill in this case was filed by the appellees against the appellants, H. J. Simon, their debtor, and H. E. Jones, trustee, to set aside a deed in trust by said Simon, conveying his stock

Opinion.

of goods in his store to said Jones, as trustee, to secure certain preferred creditors, as fraudulent and void, because intended to hinder, delay, and defraud his creditors, and to set aside a certain homestead deed executed by said Simon, claiming his homestead exemption in certain goods. And other bills were filed by other creditors for the same purpose. To these bills Simon answered and demurred, and the said Jones answered.

The court, upon the hearing, set aside the said deeds, and the said H. E. Jones, having made sale of the said goods, decreed in favor of the plaintiffs the payment of their said debts out of the proceeds of the sales of the said goods in the order of their priorities, ascertained by the filing of their several bills in disregard of the claims of the preferred creditors. And the said Simon appealed to this court.

The first question we are to determine here upon the assignment of error is upon the action of the court in decreeing upon the bills, and disposing of the questions involved and setting aside the trust deed, and disposing of the rights of the beneficiaries under the said deed, when they are not parties to the suits thus brought to determine their rights. This question is well settled in this State.

Mr. Barton says in his *Chancery Practice*, vol. 1, sec. 35 : "It is a general rule in equity that all persons interested in the subject matter of the bill, and which is involved in and to be affected by the proceedings and result of the suit, should be made parties, however numerous they may be." Citing numerous authorities, the decisions in this State are in an unbroken line; and upon plain principles he whose rights are to be affected by any proceeding should be before the court, and have an opportunity to be heard. Otherwise he is not bound by the decree. *Clark v. Long*, 4 Rand., 452; *Richardson v. Davis and wife*, 21 Gratt., 709; *Armstrong's ex'or v. Gibson*, 25 Gratt., 375; Barton's Ch. Pr., p. 219, vol. 1, sec. 74; *Collins v. Loftin & Co.*, 10 Leigh, 5; *Commonwealth v. Ricks*, 1 Gratt.,

Opinion.

416; *McDaniell v. Baskerville*, 13 Gratt., 228; Story's Eq. Pl., §§ 207, 210; *Fitzgibbon v. Barry*, 78 Va., 263; *Stovall v. Border Grange Bank*, 78 Va., 188.

By the decree in this cause settling the trust deed in question, the rights of the beneficiaries under the said deed were disposed of adversely to their interest in a suit to which they are not parties and by a decree by which they are not bound. This was error, for which the said decree must be reversed and annulled, and the cause be remanded, when the plaintiffs may amend their bill, if they are so advised, and make proper parties, which will be done without deciding any other question in the cause.

DECREE REVERSED.

Wytheville.

WOOD v. DICKEY.

JULY 13th, 1893.

1. **OPTIONS**—*Want of mutuality—Specific performance.*—A court of equity in this State will not decree specific execution of a contract where there is no mutuality both of obligation and remedy, as both parties must, by the contract itself, have a right to compel specific execution. *Graybill v. Brugh*, 89 Va., 895.
2. **IDEM**—*Case at bar.*—Vendor sold to vendee by a title bond (containing no stipulation for a resale) a certain lot of land, agreeing to make vendee a deed thereto free from all incumbrances with general warranty when the last payment of the purchase money was made. When that payment became due vendee made it, and demanded such a deed as he was entitled to under said instrument, which vendor executed and delivered to him, but demanded and received from vendee a sealed obligation to build a house thereon within two years, and in the event of failing to build the house to sell back to vendor, at what he paid with interest, said lot except the ground whereon a warehouse then stood. The house was not built within the period specified, and vendor tendered the amount paid with interest to vendee and demanded conveyance. Vendee refused to accept the money and to make the conveyance. Thereupon vendor filed his bill for specific performance. Circuit court overruled the demurrer to the bill and decreed specific performance.

HELD :

The title bond is a complete contract in itself, and can alone be looked to for the conditions of the sale ; and the demurrer should have been sustained for want of mutuality in the contract for resale and the bill dismissed.

Appeal from decree of circuit court of Washington county, rendered January 7, 1893, in a chancery cause wherein John R. Dickey was complainant, and the appellant, M. B. Wood, was defendant. Opinion states the case.

Opinion.

White & Buchanan, for appellant.

Fulkerson, Page & Buchanan, D. F. Bailey, Rhea & Peters,
and *Curtain & Haynes*, for appellee.

FAUNTLEROY, J., delivered the opinion of the court.

The record discloses that on the 15th day of July, 1889, the said John R. Dickey sold to the said M. B. Wood a vacant lot of land in the now city of Bristol, Virginia, and executed and delivered to him the following written contract, setting forth fully all the terms of the whole contract, viz: "I have this day sold to M. B. Wood, one — adjoining the lot on which I now live, beginning on Main street, in the town of Goodson, and on the edge of Washington street, and running thence with said Main street one hundred feet to a stake; thence, running a straight line to the centre of the line fence between myself and Fillinger, about 360 feet to the line of Fillinger; thence a straight line to said Washington street, with said mentioned street about 365 to the beginning, estimated to be one-half and 15-100 of an acre, for which said Wood has paid to me fifteen hundred dollars in cash, and is to pay the remainder (\$1,500) at any time within six months from this date, with interest from this date. When last payment is made, I am to make said Wood a deed, free from all encumbrances, to said land, with covenants of general warranty. Given under my hand and seal this 15th of July, 1889. John R. Dickey, [Seal]."

When the said deferred payment became due, M. B. Wood paid it to the said John R. Dickey and demanded of him such a deed as he was entitled to under the said contract of sale, whereupon the said Dickey executed and delivered to the said M. B. Wood an absolute, unconditional, fee simple deed for the said lot of land free from all encumbrances and with covenant of general warranty, but demanded of and received from

Opinion.

the said M. B. Wood the following paper, viz: "This is to certify that I have purchased a certain lot of land in the town of Goodson of John R. Dickey, adjoining the lot on which he now lives. I agree and bind myself to erect thereon a good, neat dwelling-house upon a line with the house said Dickey now lives in, so as not to obstruct the view from his house looking down Main street, and in consideration of the price at which the said Dickey sold said lot to me, I bind myself to keep the front of said lot open, and build a residence thereon in which I expect myself and family to live within two years, failing to build which, I bind myself to sell said lot back to Dickey, at what I paid, with interest, except the ground on which the warehouse now stands. January 25, 1890. M. B. Wood, [Seal]." Which writing was duly recorded.

The bill was filed by the complainant, John R. Dickey, alleging that no dwelling-house, residence or other building was erected by said Wood, upon the said lot so sold to him within two years from the date of the said writing, and that on the 25th day of January, 1892, he, the said John R. Dickey, tendered to the said Wood the sum of money paid by him for said lot, with interest thereon, as provided in the said writing, to-wit: \$3,452 50 being the said sum of \$3,000 and its interest to January 25, 1892, and demanded of said Wood a conveyance of the said lot, except the ground on which the warehouse stood on 25th of January, 1890, according to the terms of the said agreement in writing, which the said Wood refused to accept and refused to convey the said lot to the said John R. Dickey. The bill prays for a decree for specific performance of the said agreement of January 25, 1890, and to compel the said Wood to convey to the said John R. Dickey the said lot of land, except the ground upon which the warehouse stood. The defendant Wood demurred to the bill, which demurrer the court overruled. The defendant then filed his answer, and upon the pleadings and proofs, the court, on the said 7th day of January, 1893, decreed the specific performance of the said agreement, and that the

Opinion.

defendant Wood shall execute and deliver to the complainant Dickey a deed conveying to him the lot conveyed to defendant by complainant by deed dated the 24th of January, 1890, except the ground upon which the warehouse, referred to in the bill and proceedings, stood, and upon the delivery of such deed, the complainant shall pay to the defendant the sum of \$3,452 50 without interest; and it is further decreed that the complainant recover against the defendant the costs of this suit, &c.

We are of opinion that the court erred in overruling the demurrer to the bill and in decreeing specific execution of the alleged contract sued on. There is no *mutuality of obligation* and *remedy* in the paper or agreement of the 25th January, 1890, which is the basis of this suit, and of the decree appealed from, without which essential ingredient no contract can be specifically enforced in a court of equity. It is not, and it cannot be, contended that the complainant, John R. Dickey, is, by the terms or intentment of the said agreement sued on, under any obligation whatever to *purchase* the lot sold to Wood under the terms of the so-called contract or option so to do, for which he paid nothing; or that Wood has any right or remedy to compel him so to do.

The title bond, signed and sealed and delivered to the purchaser, Wood, by the seller, John R. Dickey, on the 15th day of July, 1889, for the lot therein described by metes and bounds, is a complete contract in itself; and, in the absence of allegation in the bill and proof in the cause of fraud, or mistake, or omission by mistake, it is the only and conclusive evidence of the terms and conditions of the sale and purchase of the said lot; and it only can be looked to for the intention and contract of the parties. 1 Greenleaf's Ev., section 275; *She. Valley R. R. Co. v. Dunlop and wife*, 86 Va. (Hansbrough.)

A court of equity in Virginia will not decree specific execution of a contract when there is not *mutuality* in both *obligation*

Opinion.

and remedy. Both parties must, by the agreement itself, have a right to compel specific performance of it, else equity will not execute it. *Moore's administrator v. Fitz Randolph and others*, 6 Leigh 175-185; *Hoover v. Calhoun*, 16 Gratt, 112; *Chilhowie Iron Co. v. Gardner*, 79 Va. (Hansbrough), 305-311; *Cheatham v. Cheatham, &c.*, 81 Va. (Hansbrough), 395-403; *Ford v. Euker*, 86 Va. (Hansbrough), 75; *Shenandoah Valley R. R. Co. v. Dunlop, &c.*, 86 Va. (Hansbrough), 346-349; *Edichal Bullion Co. v. Columbia Gold Mining Co.*, 87 Va. (Hansbrough), 641-645; *Graybill v. Brugh*, 89 Va., 895.

In *Duval v. Myers*, 2 Maryland Chancery, 401, it is said by the court that the right to a specific performance of a contract, so far as the mutuality is concerned, depends upon whether the agreement itself is obligatory upon both parties; so that upon the application of either against the other, the court would coerce a specific performance. *Rider v. Gray*, 69 Amer. Dec., 135; *Marble Co. v. Rippley*, 10 Wall., 359.

Our judgment is to reverse and annul the decree complained of as wholly erroneous, and to dismiss the bill upon the demurrer.

DECREE REVERSED.

Wytheville.

ECHOLS v. CITY OF BRISTOL.

JULY 13th, 1893.

RAILROAD COMPANIES—Municipal subscriptions—Conditions precedent—Case at bar.—City of Bristol is authorized by statute to subscribe and issue its bond for \$25,000 to the S. A. & O. railroad company; provided said statute shall not be in force until the company subscribed a certain sum to a furnace company. The railroad company merely procured a transfer to itself from the V. T. & C. railroad company of \$25,000 of stock in the furnace company; on which stock the S. A. & O. railroad company, being insolvent, did not even pay the assessments.

HELD:

The subscription of the said sum by the S. A. & O. railroad company to the furnace company was a condition precedent to the issue of the bonds of the city, with which such transfer was no compliance.

Appeal from decree of circuit court of Washington county, rendered February 27, 1893, in vacation, in a chancery cause wherein A. B. Echols & als. were complainants and the City of Bristol & als. were defendants. The object of the suit was to enjoin the delivery of the bonds of the city to the South Atlantic and Ohio railroad company. The circuit court dissolved the injunction and decreed that the bonds be delivered to the said railroad company. From this decree the complainants appealed. Opinion states the case.

Fulkerson, Page & Hurt, for appellants.

J. B. Richmond, for appellees.

HINTON, J., delivered the opinion of the court.

The sole question to be determined in this cause is whether the South Atlantic and Ohio Railroad Company has complied with the conditions imposed by the act of the general assembly approved February 14, 1888, and so became entitled to the twenty-five thousand dollars of bonds of the city of Bristol, payable to the South Atlantic and Ohio Railroad Company, issued by the said city in payment of her subscription to the said railroad company and now held in escrow by the Dominion National Bank. The act of February 14, 1888, which amends an act of the same general purpose, approved May 24, 1887, authorizes the city of Bristol to make the subscription of twenty-five thousand dollars of its bonds upon the following conditions: Provided that none of the provisions of this act shall become in force until the said railroad company shall have *subscribed* an amount equal to the face value of said bonds, namely, twenty-five thousand dollars, to the capital stock of a company which shall have erected a blast furnace of not less than fifty tons daily capacity, and have the same in operation, &c., &c. The decree of the circuit court holds that this condition, which is manifestly a condition precedent, has been complied with, dissolves the injunction which had been awarded on the 10th day of September, 1891, restraining the Dominion National Bank from delivering said bonds, and orders that the same be delivered to the receivers, John C. Harskell and D. H. Conklin.

In thus deciding, the court manifestly erred. For the record shows beyond all doubt that there never has been any subscription to the furnace company by the South Atlantic and Ohio Railroad Company, but, on the contrary, that there has been nothing more than a transfer of \$25,000 of stock of a furnace company from the Virginia, Tennessee and Carolina Steel and Iron Company to the South Atlantic and Ohio railroad, and that the latter company did not even pay the assess-

Opinion.

ments on this stock, but that the same was paid by the said V. T. & C. Co., the South Atlantic and Ohio railroad being insolvent. This obviously could only make the South Atlantic and Ohio railroad a stockholder, if the transaction itself can be upheld, as to which we express no opinion, but could in no sense make it a subscriber.

This point being decisive of the case, it is only necessary to say that the decree must be reversed, the bonds be delivered up to the city of Bristol to be cancelled, and the injunction must be perpetuated.

DECREE REVERSED.

Wytheville.

READ v. COMMONWEALTH.

JULY 13th, 1893.

CRIMINAL PROCEEDINGS—*Record—Judgment.*—A writ of error will not lie where the record does not show the judgment of the trial court, but merely recites that judgment was entered.

Error to judgment of circuit court of Tazewell county, rendered June 1, 1890, in a prosecution against the plaintiff in error for malicious shooting. Opinion states the case.

Blair & Blair, for plaintiff in error.

Attorney-General R. Taylor Scott, for the commonwealth.

LEWIS, P., delivered the opinion of the court.

This is a writ of error to a judgment of the circuit court of Tazewell county, purporting to affirm a judgment of the county court of that county, sentencing the plaintiff in error to pay a fine of \$300, and to be confined in jail ten days, in a prosecution for a felony.

There is a recital in the record that, after overruling the defendant's motion to set aside the verdict, the county court "pronounced judgment upon the defendant in accordance with the verdict," and that thereupon execution of the judgment was suspended for sixty days to enable the defendant to apply for a writ of error. There is nothing, however, in the record, except this recital, to show that any judgment was pronounced in the case before the writ of error from the circuit court was sued out. The judgment of the latter court

Opinion.

was rendered on the 1st day of June, 1890, and afterwards, on the 29th of October, of the same year, the following order was entered in the county court:

"This day came the commonwealth, by her attorney, and the defendant appeared in court in obedience to his recognizance entered into at a previous term of this court; whereupon it is ordered by the court that the said Ben. Read be confined in the jail of this county for the period of ten days, and that the said Ben. Read pay the fine of \$300 in accordance with the verdict of the jury, and the costs of this prosecution, in obedience to the judgment of this court entered at a previous term."

No entry, however, of any such judgment appears by the record; nor is the order just quoted a proper part of the record before us, inasmuch as the writ of error awarded by this court is to the judgment of the circuit court, and the order was entered after the case had been disposed of by the latter court.

It is hardly necessary to say that a mere recital in a felony case that judgment was entered cannot be treated as equivalent to a judgment. The record must affirmatively show the sentence itself. *Spurgeon's Case*, 86 Va., 652. And as this is not shown by the record in the present case, it follows that there was nothing upon which the writ of error from the circuit court could operate, and, consequently, that the proceedings in that court were *coram non judice* and void. *Saunders v. Commonwealth*, 79 Va., 522. So that, instead of undertaking to affirm a judgment that, in contemplation of law, had not been pronounced, the circuit court ought to have refused the writ of error; or, having granted the writ, it ought to have dismissed it as having been improvidently awarded. Its judgment must, therefore, be reversed, and such an order entered here as that court ought to have entered.

JUDGMENT REVERSED.

VOL. xc—22

Wytheville.

NORFOLK & WESTERN RAILROAD CO. v. RASNAKE.

JULY 20th, 1893.

1. EASEMENTS—*Highways*.—No easement in land which has been established as a public road can be acquired by subsequent arbitration proceedings between the original owner and the mover of the proceedings to establish such road, to which the public is no party.
2. INJURY TO HIGHWAYS—*Suit for damages—Case at bar*.—On R.'s motion the county court established a public road through B.'s land. B. appealed. By consent the appeal was dismissed. The circuit court, at a later term, made an order referring the question of the road and damages to arbitration. The award was entered up, at a term still later, as the order of the circuit court. Afterwards a railway company injured the roadway, and R., claiming he had acquired an easement therein by virtue of said order, sued said company for damages for the injury.

HELD:

- (1) The dismissal of the appeal ended the jurisdiction of the circuit court over the case. (2) The award entered as the judgment of that court, even had it had jurisdiction, could not confer on R. any right in the road, which was a public highway. (3) R. had no cause of action for the injury against the company.

Error to judgment of circuit court of Russell county in an action of trespass on the case, by E. L. Rasnake, to recover damages for an injury by the Norfolk and Western railroad company to a roadway in which the plaintiff claimed an easement. There was a judgment for the plaintiff, and the defendant brought the case to this court. Opinion states the case.

Burns & Fuller, for plaintiff in error.

Opinion.

Routt & Stuart, for defendant in error.

HINTON, J., delivered the opinion of the court.

This was an action of trespass on the case brought in the circuit court of Russell county by one E. L. Rasnake against the Norfolk and Western Railroad Company to recover damages for an alleged injury to a roadway of which the plaintiff avers that he was the owner.

The injury consists in a deep and dangerous cut made by the defendant company across said roadway in constructing its railroad.

Several exceptions were taken by the company during the trial; but as the case must turn, after all, in the opinion of the court, upon the inquiry whether the plaintiff had any such roadway or easement as he claims, we shall address ourselves at once to that question, omitting all reference to the other exceptions.

The plaintiff asserts that he acquired this easement by virtue of "the papers and records of the county and circuit courts of Russell county"; and the roadway, if any he has, it is admitted by both sides, was over land that formerly belonged to Joseph Breeding.

From the before mentioned "papers and records" it appears that on the motion of the said Rasnake an order was entered in the county court of Russell county on the 5th of August, 1884, appointing commissioners to view and locate a road beginning in the gap between the lands of Joseph Breeding and Fullen Astrip, &c., "and report to court the advantages and disadvantages, the conveniences and inconveniences, that would result to the public as well as to individuals, and whether any yards, gardens, or orchards would be taken, or springs injured, should such road be established, and report the damages claimed, if any, and by whom; and to report to the next term of this court." The commissioners having returned

Opinion.

their report, which was excepted to by Breeding, on the 4th day of September, 1884, on the motion of Rasnake, an order was entered directing the land owners to be summoned to appear at October term, 1884, of said court, to show cause why the report should not be confirmed.

The land owners were summoned pursuant to the last-mentioned order, and at said October term Breeding moved the court to quash said report. The court having refused so to do, the case was then fully heard on the evidence and exceptions, and the court established the road as a gateway and fixed the damages to the land owners, to which Breeding again excepted, and moved the court for a writ of *ad quod damnum*, which was refused.

On the 13th day of October, 1884, an order was entered setting aside the last order, by agreement of parties, and the court entered an order establishing the road, and from this order Breeding appealed to the circuit court.

On the 10th day of November, 1884, an order was entered in the appeal case in the circuit court of Russell continuing the case.

On the 9th day of March, 1885, a second order was entered in the case, by the agreement of the parties, and the appeal was dismissed at the cost of the appellee, Rasnake.

Now, the manifest result of this dismissal of the appeal was to leave the last order of the county court, which established the road, and from which the parties had appealed, in full force and effect. *Thompson v. Carpenter*, 88 Va., 702. The road thus established was a public and not a private road. The mode in which this was done clearly shows this. It was laid out in the mode prescribed by chapter 43 of the Code 1887, and in the exercise of the sovereign power of eminent domain, a power which it is well understood can only be invoked or exercised where the property taken is taken for the public use. 6 Amer. & Eng. Ency. Law, 515.

Now, after the order of the 9th day of March, 1885, it would

Opinion.

seem, although there is some confusion in the date, the circuit court, although it plainly had no further jurisdiction of the road case, permitted an agreement to be filed whereby the said Rasnake and Breeding agreed to refer the question as to the road and damages for the same to arbitrators.

On the 7th day of July, 1885, the arbitrators filed their award, and on the 6th day of March, 1886, the award was entered up as the judgment of the court.

Now, without stopping to comment on the irregularity of such proceedings as these, it is perfectly apparent that they could not confer any right of way or easement upon Rasnake. As we have just seen, the road was a public road under the proceedings in the county court, and the public could not be deprived of its rights by any agreement of Rasnake and Breeding to submit their matter of dispute to arbitration, nor could a private easement be grafted upon a public road in a proceeding to which the public was a stranger.

It is not necessary to inquire whether a title to or an interest in real estate can be passed in this State by arbitration and award, it is enough that we can clearly see that Rasnake had no such easement as the one asserted, and therefore was not prejudiced in any legal sense by the action of the defendant company. The judgment of the circuit court of Russell county is therefore plainly erroneous, and must be reversed, and the plaintiff's suit must be dismissed.

JUDGMENT REVERSED.

Wytheville.

BROWN v. CHAPMAN.

JULY 20th, 1893.

JUDGMENTS—*Remedy at Law—Injunction.*—An injunction will not be awarded to a judgment by default upon summons directed to sheriff of another county than the one where the action is brought, although the summons was issued contrary to law, as the judgment, though erroneous, is not void, and the defendant has a complete remedy at law by motion under Code, § 3451.

Error to decree of circuit court of Wythe county, rendered at its September term, 1891, in a suit of injunction to a judgment by default, wherein F. J. Chapman was complainant and James E. Brown, the appellant, was defendant. Opinion states the case.

Blair & Blair, for appellant.

Bolling & Stanley, for appellee.

LEWIS, P., delivered the opinion of the court.

The appellee filed his bill in the circuit court of Wythe county to enjoin a judgment by default recovered against him by the appellant, at the September term, 1888, of that court, in an action of debt on bond. The process by which the action was commenced was directed to the sheriff of Roanoke county, of which county the appellee was a resident, and was

Opinion.

served on him in that county, as appears by the return thereon. The appellee was the sole defendant in the action, and the cause of action arose in W, the county.

The bill was filed about three years after the judgment had become final; and the ground upon which relief was sought was that the court in which the judgment had been recovered was without jurisdiction of the case, and, therefore, that the judgment was void.

There was a demurrer to the bill, but the same was overruled, and the prayer of the bill granted, by the decree complained of.

Section 3215 of the Code provides that an action may be brought in any county or corporation wherein the cause of action, or any part thereof, arose, although none of the defendants reside therein. But by section 3220 it is provided that in such a case process against a defendant to answer the action shall not be directed to an officer of any other county or corporation than that wherein the action is brought.

The process, therefore, to answer the action wherein the judgment in question was recovered was not properly directed, and was void. *Warren v. Saunders*, 27 Gratt., 259. But the effect of this was not to make the judgment void, though it is undoubtedly erroneous; and as the defendant (the appellee here) had a plain and adequate remedy at law, the case is not a proper one for the interference of a court of equity. *Slack v. Wood*, 9 Gratt., 40; *Knox County v. Harshman*, 133 U. S., 152.

Section 3451 of the Code provides that "the court in which there is a judgment by default, or a decree on a bill taken for confessed, or the judge of the said court in the vacation thereof, may, on motion, reverse such judgment or decree for any error for which an appellate court might reverse it, if the following section had not been enacted, and give such judgment or decree as ought to be given." And, according to the express provisions of the following section, no writ of error or appeal from such judgment or decree will lie until a motion

Opinion.

under section 3451 be made and overruled in whole or in part.

In *Goolsby v. St. John*, 25 Gratt., 146, which was a bill in equity to enjoin a judgment at law, it was held, on the authority of *Davis v. Commonwealth*, 16 Gratt., 134, that all judgments, where there has been no appearance by the defendant, are judgments by default, within the meaning of this statute, whether the defendant was legally summoned or not. And in that case the court quoted with approval the remark in *Hudson v. Kline*, 9 Gratt., 379, that "it has been a favorite policy in this State, especially of late, not to afford relief in a court of equity to a party who has a plain remedy at law, except in cases of concurrent jurisdiction," and that "in all other cases he must avail himself of his legal remedy."

In the present case the appellee might not only have set up the objections he now urges in the bill at any time before the judgment was rendered (*Warren v. Saunders, supra*), but the section of the Code just quoted gives "a plain, cheap, summary and complete remedy" against the judgment itself; and of that remedy he ought to have availed himself, and not have come into a court of equity to obtain it.

This whole subject is so fully discussed in *Goolsby v. St. John* that we need only refer to what was there said. Here, as in that case, the bill contains no allegation which takes the case out of the general rule; and the circuit court, instead of enjoining the judgment, ought to have sustained the demurrer, and dismissed the bill.

DECREE REVERSED.

Wytheville.

KING v. KING.

JULY 20th, 1893.

TENDER—Presumption of payment.—In 1862, a borrower executed bond and trust deed securing the loan to be repaid on or before April, 1864. The loan was in Confederate and such other paper and State currency as was then in circulation. In April, 1862, borrower tendered through his wife the money in Confederate notes to pay the bond. The tender was refused. On bill to enjoin sale under the trust deed in 1889,

HELD :

There was a valid tender in 1863, and by lapse of time a presumption of payment had arisen.

Appeal from decree of circuit court of Wythe county, rendered September 26, 1891, in a chancery cause wherein J. J. King was complainant and John King was defendant. The decree being adverse to the complainant, he appealed. Opinion states the case.

Robert Crockett, for appellant.

Walker & Caldwell, for appellee.

LACY, J., delivered the opinion of the court.

The case is briefly as follows :

In March, 1862, J. J. King, the appellant, borrowed from the appellee \$500, and on the 31st of March executed his bond therefor for the said sum of \$500, due one day after date, and

on the same day executed a deed in trust, whereby he conveyed his tract of land to secure the payment thereof to the said John King, the appellee, on or before the 1st day of April, 1864.

On April 1, 1864, in pursuance of the agreement of the parties in the bond and trust deed, the appellant raised \$570 and sent it to his wife, he being absent from home in the army, and to his father-in-law, to be paid to the appellee in pursuance of his obligation so to do. This money was offered to the appellee, and he would not take it in discharge of his debt, unless his creditor would receive it from him. And after three tenders of the money, he finally refused to receive it.

The money borrowed was, in part, of what is known as Confederate treasury notes, and in other part, of such paper money, State money, &c., such as was circulating at that period, and the money tendered was what is known as Confederate treasury notes, the only money then in circulation in the country where both parties lived.

The war having ended, and the appellant having returned to his home, lived from that time until 1889, then within one mile of John King, and saw him many times, and the matter was never mentioned to him, and he considered that the matter was settled by the tender which he had made, and that John King had no further claim against him. But in 1889 the trustee in the deed having died, another was substituted, and on the 7th of December, 1889, his land was advertised for sale to pay this debt.

He brought his suit and enjoined the sale, but subsequently the circuit court dissolved the injunction, and decreed that his land should be sold unless within sixty days this debt was paid. From this decree the appellant applied for and obtained an appeal to this court.

It appears that the court scaled the debt in question as of the date of March, 1862, ascertaining it to be \$371 of principal of that date with interest for more than twenty-seven years.

Opinion.

The appellant set up the presumption of payment and the *laches* of the creditor, and relied on his tender. And that if due at all the scale should be by the law applied as of the date when the debt was due and demandable under the *trust deed*. The bond was absolutely barred. But although the action at the promise is barred, the lien exists, and may be enforced, not affected by any period short of that which raises the presumption of payment, which is twenty years; and this doctrine applies, says Mr. Minor (2d vol., 374), not only to deeds of trust and mortgages, but to the vendor's lien, and in general to all specific liens on property.

But in this case there was a valid tender; the actual money was not exhibited, but was in hand, and the counting down of the money was waived by the refusal of the creditor to receive it.

The debtor is not bound to count out the money if he has it and offers it. The tender was in such money as was borrowed, and such money as was called for impliedly by the contract, and was good. There was never afterwards any demand for this money; it was refused, and the matter ended there until by the lapse of time the presumption of payment arises. The appellant, the debtor, was always ready to perform his engagement according to the nature of it, and did perform it so far as he was able, the other party refusing to receive the money. Pars. Contr. 2 vol., 771, 776.

The contract or undertaking in this case was to pay so much money of a certain kind at a certain time. In compliance with this agreement, the debtor made a valid tender, in full compliance with his contract, and he was not able to completely perform it by the refusal of the creditor to receive it. As we have said, the long lapse of time raises a presumption of payment. But under the circumstances of this case, and the change of circumstances which is involved by the act of the creditor, it is rendered impossible for the debtor to perform on his part according to the terms of his contract; and it would

Opinion.

be inequitable to permit the creditor to set up and enforce another and different contract to the injury of his debtor, who has never been in default.

The circuit court should have perpetually enjoined the defendant from selling under the trust deed, and its action in enforcing the lien, and decreeing the sale of the land, was erroneous, and will be reversed and annulled.

DECREE REVERSED.

Wytheville.

MOORE v. GREEN.

JULY 20th, 1893.

1. **VENDOR'S LIEN—Decree of sale.**—A portion of amount not being due, where the time when due is stated in a decree of sale to enforce a vendor's lien, does not render the decree erroneous.
2. **IDEM—Decree for re-sale.**—If it be error to decree to plaintiff the right to recover on a vendor's lien for an amount not then due, such error will be cured by a decree for re-sale after the amount becomes due.
3. **JURISDICTION—Decree.**—A recital in a decree that all the defendants had been duly summoned, is conclusive on appeal in the absence from the record of anything to the contrary.

Appeal from decree of circuit court of Smyth county, rendered December 15, 1891, in the chancery causes wherein J. C. Green and others were complainants, and the appellants, L. A. Moore and Nathaniel Hibbert, were defendants. Opinion states the case.

Blair & Blair, for appellants.

Walker & Caldwell, for appellees.

LEWIS, P., delivered the opinion of the court.

On the 12th of September, 1890, the appellees conveyed to the appellants certain real estate, situate in Symth county, for \$35,000. Of this sum \$11,666 66 was to be paid in cash; the residue in three equal instalments of \$7,777 77, payable, re-

Opinion.

spectively, at six, twelve and eighteen months from the 15th of November, 1890, with interest. The appellants subsequently sold the land to Morris, Turner and Timlin, by whom the cash payment, above mentioned, was paid to the appellees, pursuant to the contract between the parties.

In October, 1891, the note for the first deferred payment being due and unpaid, the appellees filed their bill to enforce the vendor's lien reserved on the face of their deed of the 12th of September, 1890. Process to answer the bill was issued, and, as the record recites, was duly served on all the defendants. The cause having been matured, a decree of sale was entered on the 15th of December, 1891, on the bill taken for confessed as to all the defendants. This decree, after reciting that all the defendants had been duly summoned, adjudged that "the defendants are indebted to the plaintiffs in the sums named in their bill, to-wit: to the amount of \$23,333 31, with interest thereon from November 15, 1890, of which sum \$15,555 54, with interest, *is due* and payable, and \$7,777 77, with interest, *will be due* and payable on the 15th day of May, 1892."

Subsequently the commissioner of sales filed his report, and afterwards, at the April term, 1892, the appellants answered. They also, at the same term, excepted to the report of sale, on the ground of inadequacy of price, which exception the court, by a decree entered at the August term, 1892, sustained, and ordered a re-sale.

The present appeal was taken from the decree of December 15, 1891; and there are two assignments of error. The first is that "it was error to decree to the plaintiffs the right to recover from petitioners \$7,777 77, which sum was not due and payable at the time of said decree." This assignment is sufficiently disposed of by the language of the decree above quoted, from which it appears that the court decreed (quite superfluously), not that the specific sum was due, but that it would become due on the 15th day of May, 1892, which is not

Opinion.

disputed. Besides, when the appellants' exception to the report of sale was sustained, and a re-sale was ordered, the whole of the purchase-money had become due; so that, even if the first decree were susceptible of the construction put upon it in the petition for appeal, it would not be an error to the prejudice of the appellants.

The second assignment of error is "that it was error to enter the decree aforesaid without the court having before it the return of an officer showing that petitioners had been summoned to court." This objection, like the first, is so entirely without merit as hardly to deserve serious consideration. The decree recites on its face that all the defendants had been duly served with process, and in the absence of anything in the record to the contrary, the presumption is conclusive that the recital is true. *Hill v. Woodward*, 78 Va., 765; *Ferguson's adm'r v. Teel*, 82 *Id.*, 690, 697. In both of these cases the court, speaking by Judge Richardson, said: "When a court of general jurisdiction has pronounced judgment, its adjudication should be as conclusive on the question whether a party was duly notified as on any other point necessary to a proper determination of the cause."

In the present case, whilst it appears that process was returned executed on the husband of the female appellant, Mrs. Moore, it does not affirmatively appear that process was served on her. But, as was said in the *Fergusson* case, another copy of the original writ may have been served on her, or the fact of service may in some way have been satisfactorily shown to the court below, though not affirmatively appearing by the record before us.

The appellants, moreover, appeared in the lower court and answered, and the objection that they were not duly summoned is for the first time made in the petition for appeal. This was too late to raise such an objection. In the pertinent language of the Supreme Court in *Creighton v. Kerr*, 20 Wall., 8, which

Opinion.

was approved by this court in *A. & D. R. R. Co. v. Peake*, 87 Va., 130, 140, "a general appearance waives all question of the service of process. It is equivalent to personal service. The question of jurisdiction only is saved."

The case is too plain for further discussion.

DECREE AFFIRMED.

Wytheville.

MOORMAN & AL. v. CROCKETT.

SAYERS & AL. v. CROCKETT.

JULY 20th, 1893.

1. CONSOLIDATION OF SUITS.—Two suits against same person, one against him as trustee, the other as executor, for claims payable out of same fund, involving the settlement of same transaction, distribution of same estate, the complainants to be affected *pro tanto* by the result of a suit for dower out of same estate; *held*, properly heard together.
2. GENERAL LEGACIES—*Interest*.—A general legacy payable in no special manner, where the will is silent as to time of payment and as to when interest is to begin to run, is not payable until one year after the executor's qualification, and does not bear interest until payable. Code, § 2706.
3. WILLS—*Construction—Advancements*.—Under a will dividing testator's property equally between a son and a daughter, and directing that he, in a settlement with his sister, shall charge himself with a certain bond given him by testator in his lifetime; *held*, such bond will be treated as an advancement to the son, and not as a gift of the entire amount to the daughter.
4. EXECUTOR—*Commissions*.—Where executor settles his accounts by mistake not before the commissioner of the proper court, where the whole matter is gone into in subsequent proceedings; *held*, no error to allow him compensation, though the accounts are not settled in time.
5. TRUSTEE—*Removal*.—A trustee, though insolvent and in arrears for a small amount when suit is brought, which arrears are subsequently paid, and where the beneficiary is entitled to the interest only during her life, and the investment is good and the sureties are solvent, will not be removed.

Appeal from decree of circuit court of Wythe county, rendered at the March term, 1891, in the chancery cause wherein Susan S. Moorman and others were plaintiffs and Robert Crockett, trustee, was defendant, and in the cause wherein Catherine A. Sayers and others were complainants and said Crockett, as executor, and others were defendants, consolidated and heard together. The decree being adverse to the complainants in each case, they appealed. Opinion states the case.

C. B. Thomas and John A. Buchanan, for appellants.

Walker & Caldwell and Fulton & Fulton, for appellees.

LACY, J., delivered the opinion of the court.

The suit of *S. S. Moorman v. Ro. Crockett*, trustee, was brought by the plaintiff, *S. S. Sayers*, before her marriage, alleging that *Dr. Robert Crockett*, deceased, was her grandfather, and that she was the *S. S. Sayers* mentioned in his will, and the defendant, *Ro. Crockett*, the person mentioned in the said will as his son, and named as trustee for her.

That by the second clause of his will the said *Dr. Robert Crockett*, deceased, provided as follows:

"I give and devise to my son, *Robert Crockett*, in trust for the benefit of my granddaughter, *Susan Spiller Sayers*, my house in which I now live, and the two lots connected with it; also the lot containing about four acres joining the property of *W. A. Stuart*, *William Gibboney*, *Mrs. Robert Gibboney*, and others. I also give and devise in trust as aforesaid to my said granddaughter ten thousand dollars in money, bonds, and accounts on hand at the time of my death; also my household furniture of every description, my gold watch and chain, my carriage and library. She is to be educated and supported from the rent of the property and interest accruing from bonds and notes, the interest on which I require the said *Robert*

Opinion.

Crockett as trustee to compound annually. The said trustee is invested with authority to manage and control the funds thus devised to my said granddaughter exclusively during her life for her and her children, should she have any. In the event that my said granddaughter should die without leaving legal heirs of her body, I give and devise one-half of all the property devised to her, in trust, to my son, Robert Crockett; the remaining half I devise to him in trust for the benefit of my daughter, Catherine Ann Sayers, and her children, to be exclusively used and controlled by him for that purpose."

That her said grandfather died on the 10th day of February, 1877.

That the said Robert Crockett qualified as executor and trustee on the 16th of March following, and executed a bond as said trustee, with Robert Sayers (the father of complainant), Wm. Stuart, F. S. Blair, and David Sexton as his sureties therein, in the circuit court of Wythe county.

That she was entitled to interest on the said legacy of \$10,000 from the date of her grandfather's death, and to have it compounded; that only a small part of her legacy had been paid to her, and that a small part out of the interest; that she could get no statement and no settlement out of her trustee, her said uncle, Robert Crockett. And that she believed that he had squandered the whole of her legacy and was insolvent; asking that the amount with which he was properly chargeable be ascertained, and decreed against him and his sureties now living and the representatives of such as had died; and that he be removed and another trustee be appointed in his stead.

Subsequently, on the 1st day of February, 1881, one Catherine C. Sayers, with Robert Sayers, her trustee, and Nellie Sayers, Mary Sayers, and Helen Sayers, filed their bill, claiming that they had certain rights under the will of the said Dr. Robert Crockett, deceased, as follows:

"Robert Sayers and his wife, Catherine, having conveyed by

Opinion.

deed the farm known as a part of the Wohlford farm, and for which I mainly paid, to my son, Robert Crockett.

"I give and devise to my said son, Robert Crockett, in trust for the benefit of my daughter, Catherine Ann Sayers, and her children, other than Susan Spiller Sayers, my farm on Reed creek, with all the agricultural implements, stock of every description, to her and her children in trust as aforesaid forever.

"I give and devise to my said son, Robert Crockett, in trust as aforesaid, and with like provision, all the household furniture of every kind, including plate, piano, books, &c., to my said daughter, Catherine Ann Sayers, and her children (not including Susan Spiller Sayers), now in her possession, and which has recently been transferred to me, and for which I paid a fair price in money.

"The residue of my property, of all descriptions, including railroad stock, I give and devise one half to my son, Robert Crockett; the other half to my said son, Robert Crockett, in trust, as before provided, for the benefit of my said daughter, Catherine Ann Sayers, and children." And also a codicil:

"My son, Robert Crockett, in a settlement with his sister, C. A. Sayers, is to charge himself with the amount of the bond I let him have on the Messrs. Wysors and Miller, which amounted to three thousand dollars in the fall of 1875. This sum to be subjected to his control as trustee for the benefit of C. A. Sayers and her three daughters, as directed in my last will and testament."

Alleging that the said Robert Crockett had never, as executor, returned any inventory and appraisement of the estate of his testator, nor made any settlement before the commissioner of accounts of the court before which he qualified, praying that he be required to settle and charge himself with the whole of the bond of Wysors and Miller mentioned in the codicil above, as trustee, as the whole of it belonged to the said Mrs. Sayers and her children. That the liens on the real

Opinion.

estate of the said Crockett paid complainants be properly adjusted, and the charge on the realty of complainants on account of the dower interests of the widow of the testator, Dr. Robert Crockett, Sr., who survived him.

It appears that when the said Dr. Robert Crockett made his will, he provided for his wife, Mary, after his death, a support at the house of his daughter, Catherine, and practically cut her off from all participation in his estate, as she was his second wife and not the mother of his children.

This Mrs. Mary Crockett, to whom reference is made in the bill of Mrs. Sayers and others, renounced the provisions of her said husband's will and filed her bill, and demanded her legal rights. Soon after her husband's death, his death having occurred in February, 1877, in the month of July following, the said bill was filed. An account was ordered and taken to ascertain her legal rights. Her dower interest in the land and personalty was stated at \$15,000, and this sum had to be provided for out of the estate of Dr. Robert Crockett, both real and personal; and a very considerable alteration was then made in the wishes of the testator as expressed in his will.

At this stage of the Mrs. Mary Crockett's suit a compromise was reached, by which the said widow, who was entitled to receive \$15,000, present value of her dower right, agreed to receive in full satisfaction of all her claims for dower in both the real and personal estate of her late husband, the sum of \$8,500, and the following decree was entered in that cause on the 11th day of December, 1877, by consent of all parties:

This cause came on this day to be heard again upon the papers formerly read in this cause, and upon the inventory of the personal estate of Ro. Crockett, deceased, which was filed with the answer of Ro. Crockett and papers of this cause directly after the adjournment of the last term of this court, and was argued by counsel. On consideration whereof, and with the consent of the plaintiff as well as that of the defendants, the court doth adjudge, order and decree that the agree-

Opinion.

ment and compromise made between the plaintiff and defendants, wherein the plaintiff agrees to receive of and from Ro. Crockett, executor of Ro. Crockett, deceased, the sum of eight thousand five hundred dollars (\$8,500) in full of the entire claim against the estate of her husband, Ro. Crockett, deceased, including her dower in her said husband's real estate, as well as her distributive share in the personal estate of her said husband, including all personal property, bonds, accounts, choses in action, moneys and all else that may have belonged to or in any way controlled by her said husband, the said Ro. Crockett, deceased, and in full satisfaction of the decree entered herein at the September term last of this court, and which said sum of \$8,500 has been paid to and received by the said plaintiff in bonds, executed by divers persons and assigned to the said plaintiff, with the usual recourse by Ro. Crockett, executor of Ro. Crockett, deceased, in full payment and satisfaction of said sum of \$8,500, be and the same is hereby confirmed and decreed to be a full settlement, payment and satisfaction to the plaintiff for all and her entire claim against the estate of her said husband, the said Ro. Crockett, deceased, and of the said decree.

And it is further adjudged, ordered and decreed, and with the like consent of the parties aforesaid, that the plaintiff shall execute a deed releasing to Ro. Crockett, executor of Ro. Crockett, deceased, all her claims as the widow of her husband, R. Crockett, deceased, to her said husband's real and personal estate, in accordance with the settlement and compromise hereinbefore set out, and that said Ro. Crockett, as executor of Ro. Crockett, deceased, shall execute a deed releasing to the plaintiff all claims whatever, including all claims to any money in bank stock of the said plaintiff which may not have been reduced into the possession of and by R. Crockett, deceased, in his life time.

And the court doth further adjudge, by consent as aforesaid, and by reference to the inventory filed in this cause, and to ex-

Opinion.

hibit filed in the papers of this cause marked "J. W. C.," that of the \$8,500 paid to the said plaintiff all except \$2,833 33 thereof was paid her on account of the present money value of her dower interest in the real estate of her said husband, R. Crockett, deceased.

The court enters this decree upon the consent of the adult parties to this suit, as well as being fully satisfied from an inspection of the papers in this cause that the interests of the infant defendants to this suit have been promoted by the said settlement and compromise. And the object of this suit having been obtained, it is ordered to be stricken from the docket without costs to either party.

The said decree was endorsed as follows: Enter this. Robt. Sayers, trustee C. A. Sayers, Robert Crockett; F. S. Blair, atto. for infant defendants; Jos. W. Caldwell, for plaintiff. Let this be entered Dec. 11, 1877. J. H. Fulton (the judge of the court).

And as we have seen the decree declares that it was entered by consent of the adult parties to this suit, as well as being fully satisfied from an inspection of the papers in this cause that the interests of the infant defendants to this suit have been promoted by the said settlement and compromise.

The executor and trustee, and his sureties answered in each of the above named suits of Moorman v. Crockett and Sayers v. Crockett, and the two suits were consolidated and heard together, and decree entered for reference, and the whole matter gone into *de novo* before an experienced lawyer, who was appointed commissioner for the purpose, exceptions filed to his reports, and passed on by the court, and decree rendered in these causes at the March term, 1891, by which it is decreed as follows:

These causes came on to be again heard upon the papers formerly read, upon the decrees heretofore entered. The re-committed report of Commissioner W. H. Bolling and depositions and exhibits returned therewith upon exceptions signed

Opinion.

by both parties to said report, and was argued by counsel, upon consideration of all which the court doth adjudge, order, and decree that the exceptions to said report be overruled and that said report be confirmed, the court adopting the statement of said commissioner as to the account of Robt. Crockett, trustee for S. S. Moorman, known as statement No. 2, which shews the balance due on account of said trustee fiduciary account on first day of June, 1890, to be \$10,000 principal money and \$1,240 14 interest to date of report, viz: the first day of June, 1890, and it appearing to the court that Robert Crockett, executor of Dr. Robert Crockett, has advanced to the plaintiff in the case of C. A. Sayers *et als.* v. Robert Crockett, or to the trustee of said complainant, the sum of \$3,172 41, which bears interest from the first day of June, 1888, in excess of their shares as residuary legatees in the will of Dr. Robert Crockett, which sum is made chargeable on the real estate devised to complainants by the will of said testator. And it further appearing to the court from the facts and circumstances developed in this case that Robert Crockett, the trustee for S. S. Moorman, should not now be removed and another appointed in his stead; and that the rights of the beneficiary, S. S. Moorman, are satisfied by a preservation of the principal of the trust fund, and the annual payment to her of the interest thereon, and there being no intimation of the insolvency of the securities of the said trustee and his official bond, it is therefore adjudged, ordered, and decreed that Robert Crockett, trustee, and in his default, L. M. Trinkle, administrator of David Sexton; A. J. Stuart, administrator of Wm. Stuart, F. S. Blair, and Robert Sayers, do pay to the said S. S. Moorman the interest upon said principal fund, to wit: \$1,240 41 as of June 1, 1890, and the interest annually due upon \$10,000 during the life time of said beneficiary, subject, however, to a credit of any payments made to her since the institution of this suit, and not appearing in the report of Commissioner W. H. Bolling, and further subject to a credit

Opinion.

for any payments that may be made to her by Mrs. C. A. Sayers in this decree hereafter provided for. And the court doth further order, adjudge, and decree that of the sum of \$3,172 40 due from the plaintiffs in the case of C. A. Sayers and *als. v. Robert Crockett, ex'or, and als.*, with interest from the first day of June, 1888, which is charged by this decree as a lien upon their land; that the plaintiff do pay to said Robert Crockett, as trustee for S. S. Moorman, the interest on the principal sum to the first day of June, 1890, and thereafter they shall pay said interest to the said trustee for said Mrs. Moorman annually on the first day of June, 1891, and on the first day of June each year thereafter.

It is further adjudged, ordered, and decreed that the complainants in the said last-named cause do secure and provide for the payment of the said sums of interest and the principal above named to Robert Crockett, trustee, and that the said sum of principal be held by the said trustee as a permanent investment of so much of the trust fund so long as they pay the interest thereon, and the said trustee is entitled to receive the same. It is further decreed that unless the said Robert Crockett, trustee, or sureties above named, and the said plaintiffs in said cause of C. A. Sayers and *als. v. Robert Crockett and als.*, do pay the several sums of interest above decreed to be paid by them as the same shall fall due, then that the parties entitled to receive the said annual payments of interest shall have leave to sue out writs of *feri facias* therefor, and to apply to this court for such further orders and decrees as may be necessary to carry out this decree and to secure the rights of all the parties interested and the security of the trust funds, and for this purpose it is ordered that these causes be retained upon the docket until the further order of this court.

From this decree the appellants applied for and obtained an appeal to this court.

The report of Commissioner Bolling above referred to, and over which this controversy has arisen, is as follows:

Opinion.

In obedience to your honor's decree entered in these two causes, in vacation, I gave notice to the parties and proceeded to reform and restate the several accounts directed, and append the result of my work hereto as a part of this report.

In stating the account of the dealings of Rob. Crockett, as executor of his deceased father, with the assets in his hands, I have disallowed vouchers 1, 2, and 3, allowed by Commissioner C. B. Thomas, because this money was not a part of the assets of testator. Dr. Crockett was executor of Simmerman, who was the father of Mrs. J. P. M. Simmerman, testator, bequeathed a legacy to a family of negroes, who were at the date of the will, and at the time of testator's death, his slaves. Dr. Crockett was advised that these legatees were incapable of taking, under the will, the legacy thus bequeathed to them; and J. P. M. Simmerman demanded that this money should be paid to him; and the executor paid him the money, but took an indemnifying bond from him. After the war these negroes sued and recovered the legacy, and had a decree directing the executor, Dr. Crockett, to pay it over to them with accrued interest; and this money, \$4,588, specified in these three receipts, was paid to Robert Crockett, as executor of his father, Dr. Ro. Crockett, by J. P. M. Simmerman to meet the decree in favor of these negroes, and I submit that it is no part of his estate, and the executor should not be allowed commissions on this sum to be taken out of the assets of the estate. Having disallowed this charge, I also disallowed the credit to the estate. I further disallowed the credit of voucher 29, \$8,500, but allowed only \$2,833 33 of the sum, which is all that is chargeable to the personal estate, under the decree in the case of Mary Crockett v. Robt. Crockett *et als.*, entered on the 11th of December, 1877. By this decree the balance, \$5,666 67, is made a charge on the real estate, as per estimates of the value of the same, as shown by exhibit "J. W. C.," which is made a part of this decree.

This decree is signed by Robt. Sayers, trustee, and Cath. A.

Opinion.

Sayers, his *cestui que trust*, and by Robt. Crockett, and is entered by consent, and the court is made to adjudge, order, and decree that, of the sum of \$8,500 paid the widow of Dr. Crockett, only \$2,833 33 shall be charged against the personalty, and the balance, \$5,666 67, is made a charge on the real estate devised under the will, and is the (then) present value of her (Mrs. Mary Crockett's) dower in these lands. The relative value of the lands is fixed in exhibit "J. W. C.," which is made a part of this decree. In this, the lands devised to Mrs. C. A. Sayers and her children, other than Susan S., is valued at \$25,000; that devised to S. Sayers, at \$8,000; and the sum of \$3,000, which Robt. Crockett is required to account for, is treated as land.

By these figures the amount that is made a charge upon Mrs. Sayers' land is \$3,935, and that upon S. S. Sayers' is \$1,259 20, and the balance of this sum of \$5,766 67 is chargeable upon the \$3,000 treated as realty as above stated. Having disallowed the charge against the personal estate, it is proper to treat this sum as money advanced by Robt. Crockett for Mrs. Sayers, or for her trustee, to pay the amount charged upon her real estate, to wit: \$3,935, and in stating the account between him and Mrs. Sayers, as residuary legatee, to credit him with this sum, and interest upon it, from the date that it was paid, and I have accordingly so treated and credited it. This sum, with its interest, or so much of it as has not been paid back by Mrs. Sayers' part of the residue of the estate (personalty), should be treated as a lien upon the real estate devised to her and her children, other than Susan S. This sum I ascertain to be \$3,172 40, as of June 1, 1888.

And to this report exceptions were taken, which the court overruled, and which action of the court is assigned as error here.

The first error assigned here is as to the action of the court in hearing the two above mentioned causes together.

From what has been said, it appears that the two suits were

Opinion.

claims against the same person—one against him as trustee, the other against him as executor—the interest of each complainant demanded out of the same fund, and their rights and liabilities involved the settlement of the same transaction and the distribution of the same estate. And, moreover, they were *pro tanto* to be affected by whatever was to be the final end of the Mary Crockett suit for dower out of the same estate in which they claimed their rights. It was a proper case for the consideration of the two causes; and it was inevitable that they should be heard together, and the complainants have no cause of complaint on this account, as it is inconceivable that they were or could have been in any wise prejudiced thereby.

The second assignment is that the executor is not charged with his portion of the burden of the dower claim above mentioned by a *pro rata* charge on Lorette, or the Wohlford farm, which is the real estate conveyed to Ro. Crockett by Sayers and wife at the request of the executor. This was not land or real estate out of which the widow could have demanded dower; it was never the property of the testator. But it appearing that a part of the purchase money of this real estate had been advanced by the testator, as between his distributees this much *was* made liable, and no more could be demanded; but this arrangement was agreed to by Mrs. Sayers and her trustee and sanctioned by the court's decree in the Mary Crockett suit, which was never appealed from, and cannot now be questioned.

The third assignment of error is that the legacy left to Mrs. Moorman was not made to carry interest from the date of the testator's death.

It is the rule in this State that the legacy bears interest at the end of one year. It is not payable sooner under our law. Section 2706 of the Code of Virginia. The general rule is varied, if there be a future day named for the payment of the legacy, or some other period be fixed by the will when the interest is to begin. In this case there is nothing to take this

Opinion.

legacy out of the general rule and place it under any exception.

The will is silent as to these questions. It is a general legacy payable in no special manner. And there is nothing in the relation of the parties to change it. The legatee, an infant, lived in the home of her parents, and was amply provided for in other respects, and the testator did not stand *in loco parentis* as to her. *Morrison v. Lowell*, 82 Va., 591; *McCormick v. Wright*, 79 Va., 524; 2 Rob. (Old) Pr. 106; *Anderson v. Burwell*, 6 Gratt, 445; *Sholes v. Carr*, 3 Munf., 10; *Leighton v. Leighton*, 2 John. Ch., 614; 2d Lomax on Executors, 271.

The next assignment of error of sufficient importance to be especially noticed is the exception which concerns the true construction of the codicil mentioned above concerning the bond of Wysors and Miller, advanced to the son during the life of testator, but which he was required to account for with his sister, who was, under the will, entitled to one half of the *residuum*, and the son, the executor under the will, the other half. The said executor has charged himself as such with this bond, as the will directed, and treated the gift as an advancement to be brought in before distribution, and one half went to the sister and one half to himself. But the sister claims it all; that the gift of the father to the son was all given to her by the will. There is nothing whatever to justify this contention. Wherever in the will these two children are provided for out of the personalty, one is to have one half and the other the same. If Susan Spiller Sayers (Mrs. Moorman) dies childless, her interest is divided equally between the two. The *residuum* is so divided, and there is nothing in the clause in question, in the codicil, and nothing in the whole scheme of the will to justify this contention.

It is assigned as error that the executor not having settled his account as executor before a commissioner of the circuit court *ex parte*, which was the court in which he qualified, that he should have had all these disregarded and his commissions

Opinion.

denied him. It is not material to consider what is the due effect to be given to the acts of the commissioner of the county court, who was the regular commissioner of accounts of the county court, and his action, and the action of the executor in laying his accounts before him, was an inadvertence. There was no such commissioner in the circuit court, and all accounts were laid before this one.

But that is all cured by the result of these proceedings as the whole matter has been fully gone into, and every opportunity afforded these complainants which they could desire, or to which they could be entitled in any tribunal.

But by Section 2678 of the Code of Virginia, commissions may in a proper case, nevertheless, be allowed to a fiduciary although he may fail to settle his accounts in time. In this case the court has so allowed compensation to the fiduciary, and it was a proper case for such action. The settlement had been made, but by mistake not before the commissioner of the proper court. This was no reason for disallowing compensation to the executor as prescribed by law.

There is another assignment that certain small sums are not accounted for by the executor, but it is pointed out that being small they have been charged in the aggregate of \$45,976, and there is no merit in this complaint.

The next assignment of error by Mrs. Moorman is the refusal of the court to remove the trustee and appoint another in his stead. It appears that when this suit was brought the trustee was in arrears a very small sum for interest for that year, and that after suit brought, payment of interest ceased until the amount was judicially ascertained, and further that all interest in arrears has been paid; that the beneficiary in the trust is entitled during her life to the interest only, and cannot demand the principal. It appears then, although the trustee is insolvent, that his sureties are unquestioned in solvency, and are admitted to be solvent and safe. It could not benefit the complainant to change the investment, now per-

Opinion.

fectly good and satisfactory, it could not be better invested, and there appears to be no ground for the removal of the trustee in this case.

Upon her death without children, Robert Crockett gets one-half of her legacy, and her mother, the complainant, Catherine A. Sayers, in the other suit heard with Mrs. Moorman's, gets the other half. And the record shows that the said Mrs. Sayers is indebted to the trust fund of her daughter, Mrs. Moorman, in what is not very far from what her one-half would be. So that the rights of all the interested parties appear to be as well provided for as they could be by the terms of the decree which we have already cited, and that the interest must hereafter be promptly paid; and, moreover, the case is retained on the court's docket, and the trust is therefore practically to be administered by the court.

The complainant, Mrs. Catherine A. Sayers, assigns as error, as also does Mrs. Moorman, that the amount due by Mrs. Sayers to the executor should be treated as an investment of a part of the trust fund *pro tanto*. Of this Mrs. Sayers cannot complain, because if more agreeable to her, upon payment of the money, the investment would be changed by the court. And Mrs. Moorman cannot object, because the security is ample; and provision is made by which all that she is entitled to (the interest during her life) is amply provided for by the court.

This concludes the discussion of all of the exceptions of the appellants and their assignments of error.

And upon careful consideration of all the questions involved, we are of opinion that the circuit court of Wythe county has decided all the questions herein correctly, and that there is no error in the decree appealed from, and we will affirm the same.

DECREE AFFIRMED.

Wytheville.

HILL v. POSTLEY.

JULY 20th, 1893.

PARTNERS—*Powers—General Assignment.*—It is settled law that one partner has no implied authority to make a general assignment of the partnership effects for the benefit of creditors, unless his co-partner is absent or incapable of giving his assent or dissent.

2. WITNESSES—*Objection to competency.*—Objection to competency of witness, held, not necessarily waived unless made before examination in chief. *Warwick v. Warwick*, 31 Gratt., 70.
3. IDEM—*Case at bar.*—Defendant does not become a competent witness in an action on a note given plaintiff for an antecedent debt, wherein the latter is incompetent, because of the fact that the note was given at the instance and in the presence of plaintiff's agent, who has testified in the case, the contract having been made with plaintiff and not with agent.
4. CONSOLIDATION OF CAUSES is a matter of discretion with the court below, and will not be disturbed, unless there was an abuse of discretion.

Appeal from decree of corporation court of Bristol, rendered September 21, 1892, in a suit in equity wherein Fannie C. Postley, suing by her next friend, W. W. Davis, was complainant, and A. M. Postley and F. M. Hill, partners trading under the firm name and style of A. M. Postley & Co., were defendants. The case is sufficiently stated in the opinion.

Blanchard & Ashworth, for appellant.

Fulkerson, Page & Hurt and *H. G. Peters*, for appellee.

LEWIS, P., delivered the opinion of the court.

Opinion.

On the first of April, 1891, A. M. Postley and F. M. Hill, residing in Bristol, Tenn., entered into a co-partnership to conduct the grocery business in Bristol, Virginia. By the articles of co-partnership, Postley agreed to contribute \$2,000 in cash as the capital with which to commence the business. This sum was contributed; but the appellee, Mrs. Postley, the wife of A. M. Postley, who was the plaintiff below, contends that it was advanced or loaned by her to the firm; that the firm recognized its indebtedness to her; and that on the 18th day of August, 1891, she obtained from the firm its note for \$2,000, payable to her one day after the date of the note. This note was executed by Hill for the firm, and in the body of the note it is recited that the money for which it was given was the separate estate of Mrs. Postley, and that the same went into the purchase of the stock of goods then on hand.

On the 21st of April, 1892, the note being due and unpaid, Mrs. Postley instituted the present suit, and sued out an attachment, which was, on the same day, levied on the partnership effects; and there was an order of publication against the members of the firm, both of whom were non-residents. A few minutes, however, before the levy of the attachment, a general assignment of all the personal effects of the firm by Hill, for the benefit of creditors, was filed for recordation in the clerk's office; and the principal question in the case is, whether or not this assignment is valid. If it be valid, the attachment was improperly levied, and ought to have been abated. If, on the other hand, it be void, then there was no error in overruling the motion to abate the attachment, and the decree in favor of the plaintiff must be affirmed.

The validity of the assignment is sought to be maintained on the ground that, for several months prior to its execution, A. M. Postley, was mentally and physically incapable of attending to the business, or of aiding therein in any way, and that the entire care and responsibility of conducting it was consequently left to Hill. But of this there is no proof, save Hill's

Opinion.

deposition, and that was excluded by the court below as incompetent evidence.

It is settled law that one partner has no implied authority to make a general assignment of the effects of the partnership, unless his co-partner is absent so that he cannot be consulted, or is incapable of giving his assent or dissent. Such an assignment is a virtual dissolution of the partnership; it supercedes all the business of the firm, as such, and takes from the control of each partner all the property with which the business is conducted; nor do the purposes of the business require that such a power should be implied.

In *Anderson v. Tompkins*, 1 Brock., 456, a general assignment by one partner for the benefit of creditors was sustained by Chief Justice Marshall; but the case was decided on the ground that the other partner had left the country, and had presumably confided everything which respected their joint business to the partner by whom the assignment was made, and who, therefore, was under the necessity of acting alone.

This case was cited with approval in *M'Callough v. Somerville*, 8 Leigh, 415, in which case Judge Carr said: "Following this high authority, I conclude that a partner has a right to convey the social effects (save real estate) to trustees, to pay specified creditors of the firm, and this without the assent of his co-partner, where (as here) that co-partner resides out of the State, and the grantor is sole manager of the concern." The same principle was recognized in *Gordon v. Cannon*, 18 Gratt., 387. But in no case, of which we are aware, has the general rule, above stated, been impugned.

In the notes to *Livingston v. Roosevelt*, 1 Am. Lead. Cas. (at p. 447), the annotators say: "Thus far there is no American case which says that one partner, when the other members are present, may, without their consent, make a general assignment of the firm effects to a trustee for the benefit of creditors."

See, also, Coll. on Part., sec. 395; Story on Part. (6th ed.), sec. 101, and cases cited in the notes.

Opinion.

In the present case it is not pretended that the assignment in question was made with the assent of Postley, though he and the grantor resided in the same town; and in his answer he says it was made without his knowledge or consent, and against his will. It is contended, however, that he was mentally incapable of assenting; but this contention rests altogether on Hill's answer and deposition, and the latter was rightly excluded by the lower court as incompetent evidence, on the ground that Mrs. Postley, the plaintiff, was not competent to testify. The evidence, indeed, for the plaintiff shows that in August, 1891, when the note was executed, Postley was seriously ill; but for aught that appears from the record, independently of Hill's deposition, he had been fully restored to mental and physical vigor in April, 1892, when the alleged assignment was made.

It is true no objection to Hill's competency as a witness was taken before his examination in chief; but objection was made before the cross-examination was commenced, and there is nothing to warrant the inference that the objection was delayed for the purpose of obtaining any unfair advantage. In *Hord's Adm'r v. Colbert*, 28 Gratt. 49, it was held that an objection to the competency of the witness after he had been cross-examined at length upon all the issues involved, came too late. But it has never been decided in this State that objection to the competency of a witness is necessarily waived, unless made before the examination in chief. On the contrary, in *Warwick v. Warwick*, 31 Gratt. 70, there was no objection until after the examination in chief had commenced, and it was held that this was not a waiver of the right to object. The general rule undoubtedly is that objection to the competency of a witness ought to be taken before the witness is examined in chief; but the rule is not inflexible. Each case must be determined on its own circumstances; and if there was no waiver in *Warwick v. Warwick*, there are no circumstances requiring a different ruling in the present case.

The point made by the appellant, that Hill was a competent

Opinion.

witness, under the statute, because the note was executed at the instance, and in the presence, of Thomas, the brother and alleged agent of Mrs. Postley, who was competent to testify, and did testify, in the case, is not well taken. The contract was not made with Thomas, but with Mrs. Postley, the consideration for the note being the previous indebtedness of the firm to her; and besides, the note and the subsequent assignment are entirely separate and distinct transactions.

This being so, there is no evidence to bring the assignment within any exception to the general rule above stated; and the assignment being, therefore, void, and not merely voidable, it constituted no impediment to the levy of the plaintiff's attachment on the property embraced in it. *Loeb v. Pierpoint*, 58 Iowa, 469; 43 Am. Rep., 122.

It was contended in the argument that the plaintiff gave to her husband the money for which the note was executed, and that the firm was in no way liable to her for it. If this be true, then Hill, in executing the note, perpetrated a fraud on "the honest creditors" of the firm for whose interests he now professes great concern. But the contention is negatived, not only by the recitals in the note, but by the evidence of Thomas as to what occurred between Hill and himself when the note was signed. According to this witness, Hill remarked when he signed the note that the money was Mrs. Postley's, and had been used in buying the stock of goods, and that she ought to be protected. The same witness also says Hill admitted the firm's liability to her for the money, and that he willingly signed the note.

Another ground of error is the refusal of the lower court to consolidate the present suit with several other suits pending in the same court to set aside the assignment on the ground of fraud. This, however, was a matter in the discretion of the court, which does not appear from the record to have been injudiciously exercised. *Patterson v. Eakin*, 87 Va., 49.

DECREE AFFIRMED.

Wytheville.

NORFOLK & WESTERN RAILROAD CO. v. THOMAS' ADM'R.

JULY 20th, 1893.

1. RAILROAD COMPANY—*Negligent killing—Alter ego.*—An engineer, with the knowledge and permission of the conductor, who was the representative of the company, left his engine to be operated by an inexperienced fireman. Whilst making a flying switch, by the improper management of the engine by that fireman the brakeman was killed.

HELD :

The company was liable.

2. DECLARATION—*Sufficiency.*—Where declaration details the facts of such killing, and alleges that at the time thereof the engine was under the management of such fireman, it is sufficient, and notifies the company that it will have to defend for failure to keep a competent engineer.

Error to judgment of circuit court of Pulaski county in an action of trespass on the case for the negligent killing of J. C. Thomas, deceased, wherein said Thomas' administrator was plaintiff and the Norfolk and Western railroad company was defendant. Opinion states the case.

Phlegar & Johnson, and *J. E. Moore*, for plaintiff in error.

Wysor & Martin, and *White & Buchanan*, for defendant in error.

HINTON, J., delivered the opinion of the court.

Opinion.

At the trial the jury found a verdict for the plaintiff for \$4,000, subject to the demurrer to the evidence, and the court entered judgment thereon.

Now, by thus demurring, the defendant company, according to the settled rule, waived all evidence on his part in conflict with that of the demurrer, admitted the credit of the evidence demurred to, and all inferences of fact fairly deducible therefrom, and referred it to the court to deduce the fair inferences from the evidence. *Hansbrough's Ex'ors v. Thom*, 3 Leigh 147; *Trout v. The Va. & Tenn. R. R. Co.*, 23 Gratt., 630. Applying this rule, the case appears to be as follows:

Thomas, who had only been in the employment of the railroad for five or six days as a yard brakesman, was one of a crew, consisting of the conductor, engineer, fireman, and three brakesmen, whose business it was to shift cars and make up trains on said yard.

In this yard there are two tracks—one called the lead track, from which a switch track, known as Switch No. 2, led off in a southeasterly direction, and another on the north side of the lead track called the main track. And between the lead track and the main track there was a cut off, which on the lead track pointed east.

At the time of the accident, all but one of the six or seven cars had been put on Switch No. 2, and that one the company, through its conductor, who was present in person, ordered to be put on the lead track, *west* of the cut off, and the engine to go on the main track.

This the conductor ordered to be done by a flying or running shift. Such shifts are more dangerous than shifts with chain and push-pole, and are made in the following manner: The engine is coupled to the car and both are put in motion; when the momentum is sufficient to carry the car beyond the switch, the speed of the engine, in obedience to a signal from the man who is on the car, slackens, so that the coupling-pin can be withdrawn. The pin is then withdrawn, the engine is

Opinion.

signalled to go ahead, and its speed is gradually increased until it runs ahead of the car, passes the switch on one track, when the switch is changed before the car reaches it, and thereby the car is thrown on a different track from the engine.

When the order for making this flying shift had been received, the crew immediately set about executing the order. Fannin, the conductor, went to the cut-off switch on the main track; Kent got on top of the car to "ride" it—that is, to give signals to slack the engine, the signals to uncouple, and for the engine to go ahead after the coupling-pin had been removed, and to put on the brake to stop the car; Thomas got on the foot-board at the rear of the tender to uncouple the car, and was holding on to the iron rod placed there to keep from falling off while uncoupling the car; the engineer, Mr. Fadden, alone was not discharging his duty, but had turned his engine over to one Henninger, an inexperienced fireman, who had only been in the service of the company for three or more weeks, and had never been in the service of a railroad before. And it is shown that the conductor who represented the company knew the fact that this raw and inexperienced engineer was running the engine, and must have known that Thomas was acting as brakeman.

Under these circumstances they started to make this dangerous flying or running switch. At the proper time Kent signalled the fireman to slack up. The fireman, however, did not slack the engine as he should have done, by simply shutting off the steam without reversing the engine. He did the very opposite. He did *not* shut off the steam, but slackened by *reversing* the engine, and as a consequence the cylinders got full of steam, and of all this, Thomas, by reason of his position, his back being to the engine, was ignorant. When the engine slackened, Thomas withdrew the coupling pin and cut loose the engine from the car. Kent then signalled the fireman to go ahead, when the fireman, without shutting off the steam, threw the lever forward as far as it would go, thus

Opinion.

giving full effect to the steam that had accumulated in the cylinders. This accumulated steam being thus brought suddenly into full play, "caused the engine to start or jump suddenly forward with quick motion with such great force as to jerk Thomas off the board and break his hold on the iron rod, and threw him on the track." He fell, was run over by the car, and his right foot, leg, and arm were so crushed that he died in five hours and some minutes thereafter. He was 26 years old, and was getting \$1 35 per day. He left a widow and one child about one year old, and another was born about five months after his death.

Such, in brief, say the counsel for the defendant in error, in their note, is a fair statement of the evidence in the case when viewed, as it must be, upon a demurrer to the evidence; and after a careful examination we are satisfied the statement is true.

Now upon these facts the court below has given judgment for the plaintiff, as we have seen. Ought this judgment to be disturbed? We think not.

It was unquestionably the duty of the company to provide and keep a competent engineer to run the engine. This it impliedly contracted to do when Thomas entered the service of the company, and he had the right to rely upon the presumption that they would discharge their duty in this respect. Now did they perform this duty by permitting the engineer to turn over the management of the engine to a raw and inexperienced man, who, far from being an engineer, was just learning the duties of a fireman. Surely to ask the question is to answer it. But it is said that this was the act of the engineer, and that the engineer and brakeman are fellow servants, and that this negligence of the engineer was one of the risks Thomas assumed when he entered into the service of the company. However, this may be ordinarily, for we do not desire to express any opinion upon the point, it is perfectly clear that it can afford the company no protection in this case. For

Opinion.

here the company was represented by its *alter ego*, the conductor, who saw everything that was done, and *permitted* the duties of the engineer to be discharged by this inexperienced apprentice. Had he thought for a moment, he could almost have foreseen the inevitable result. It is said, however, that that there is no allegation of the failure of the company to keep a competent engineer in the declaration, and, therefore, that question is not in issue. We attach no importance to this objection. The declaration details all the facts of the case with the utmost particularity, especially that the engine was being managed and run by a fireman of little or no experience in the management of the engine, and this was all that was necessary to advise the company what complaint it was called upon to answer.

It is clear beyond controversy that the negligence of the company contributed to and had a share in producing the accident, and this renders the railroad company liable, even though the negligence of a fellow servant of the plaintiff was contributory also. This has been held over and over again. *Grand Trunk Railway v. Cummings*, 106 U. S., 700; *Richmond and Danville R. R. Co. v. George*, 88 Va. R., 229; *Lawson's Rights, Remedies and Practice*, p. 543, sec. 307. This is decisive of the case. The judgment of the circuit court of Pulaski county is right and must be affirmed.

JUDGMENT AFFIRMED.

NOTE.—Negligence of railroad companies in respect to flying switches is treated of in note to *Kentucky Central R. R. Co. v. Smith*, 18 L. R. A., 63.—*Reporter*.

Wytheville.

KING v. NORFOLK & WESTERN RAILROAD CO.

JULY 20th, 1893.

1. **DEEDS—Construction.**—Two deeds embracing same subject matter, between same parties and relating only to same transaction, the latter executed to correct a mistake and supply an omission in the earlier, should be construed together as one deed.
2. **DESCRIPTION.**—Boundary lines of lands conveyed to a railroad company should stand as fixed by the deeds, and not be shifted to meet any change of the track found necessary or desirable.
3. **ADVERSE POSSESSION.**—Railroad company's right of way to land conveyed to it under agreement with grantor that he might use any portion of it not needed by the company, he to yield possession whenever it should be needed by the company, is not affected by its being unenclosed, vacant of buildings, or unoccupied at any time.

Appeal from decree of circuit court of Washington county, rendered February 4, 1892, in the chancery cause wherein the appellant, Joseph L. King, was complainant, and the Norfolk and Western railroad company was defendant. Opinion states the case.

Vance, and *White & Buchanan*, for appellant.

Fulkerson, *Page & Hurt*, for appellee.

FAUNTLEROY, J., delivered the opinion of the court.

By a deed dated 18th of June, 1848, James King conveyed to the Virginia and Tennessee Railroad Company a parcel of

Opinion.

land, 370 feet wide, and 1500 feet long, which said length, the evidence shows, was three times the length that the said James King's ownership and right to convey extended, and ran the distance of 1000 feet into the lands of S. E. Goodson, the co-terminous land owner. This deed was acknowledged June 18, 1848, and was recorded December 31, 1857. The land conveyed by the said deed is described in said deed as "a parcel of land containing about ten acres, and lying on the line of the Virginia and Tennessee railroad, near the line between the States of Virginia and Tennessee, and bounded as follows: Commencing at a stone on the State line, 185 feet from the centre line of said road and at right angles to the same, and running at right angles across said centre line a distance of 370 feet, thence parallel to the said line of road a distance of 1500; thence at right angles across the road a distance of 370 feet; thence parallel to the line 1500 feet to the point of commencement, containing ten acres in addition to the 80 feet before conveyed for the right of way to said road: provided, however, that the said company shall have no power to sell or convey said land to any other person; nor shall the said company have the right to use any portion of said land for any other purposes than those strictly connected with the business of the road; nor shall the said company have the right to erect any buildings on said land designed for a residence for the agents or servants of the company, or for any other purpose. It is further understood, that the said James King shall have the right to use any portion of the land not required by the said company, he yielding possession of the same whenever the land shall be needed by the company." And with the further proviso, that "for the sum of \$250 the said James King conveys to the Virginia and Tennessee Railroad Company the right to erect on a portion of the said tract, not exceeding three acres, the buildings necessary for the accommodation of their agents and servants."

By a deed dated the — day of June, 1852, James King con-

Opinion.

veyed to the Virginia and Tennessee Railroad Company a parcel of land 370 feet in width, and extending from the line of S. E. Goodson to the line between the States of Virginia and Tennessee. This deed was not recorded, but is wholly in the handwriting of James King, and was in the possession of the appellee, the Norfolk and Western Railroad Company, the successor of the grantee, the Virginia and Tennessee Railroad Company. This possession is *prima facie* evidence of its delivery by the grantor to the grantee. 2 Greenleaf Evidence, section 297. The deed of June, 1848, and the deed of June, 1852, were made more than forty years ago. James King, the grantor in both the said deeds, lived over fourteen years after the deed of 1852 was made, and died on the 24th day of July, 1886, leaving his will, which was duly proven and admitted to record, never having, either in his lifetime, or in his said will, raised any question, or set up any claim, as to the boundaries of the land conveyed to the Virginia and Tennessee Railroad Company by the deeds of 1848 and 1852; and the appellant, Joseph L. King, allowed twenty-three years to elapse after the death of the said James King, the grantor in the said deeds, before the filing of his bill in this cause. During the long period of over forty years the railroad company has been in the possession, use, and control of the land, and no attempt has been made or asserted by the appellant, or by James King, to use the said land, or to make improvements thereon.

The deed of June 18, 1848, conveyed 1,500 feet of land along the appellee's road, when, in fact, the grantor, James King, owned only 500 feet between the State line and Goodson's line. The deed of 1852 corrected this mistake by conveying the land, 370 feet in width, between the State line and Goodson's line. By the specifications in the deed of June 18, 1848, the grantor failed to convey to the State line, and the land conveyed touched the State line only at the point of beginning, and thereby left unconveyed a wedge-shaped, triangular piece of land between the land conveyed and the State

Opinion.

line. The deed of June —, 1852, corrected this by beginning on Goodson's line and conveying to the State line. From the face of the deed, and from the evidence in the cause, it is manifest that the purpose and achievement of the deed of June —, 1852, corrected the two aforesaid mistakes in the deed of June 18, 1848, as to the boundaries of the land conveyed by both the said deeds.

At the September rules, 1890, the appellant, Joseph L. King, filed his amended bill in the cause of Joseph L. King, complainant, against A. M. Carter *et als.*, defendants, in the circuit court of Washington county, making the appellee, the Norfolk and Western Railroad Company, a party defendant, and charging that, under the deed of June 18, 1848, of James King, deceased, to the Virginia and Tennessee Railroad Company, the said Norfolk and Western Railroad Company had entered upon and was occupying so much of the lands conveyed by the said deed of June 1848, as was needed for its purposes, leaving a considerable portion unoccupied and not needed for the purposes of the said railroad company; that said land had grown to be valuable by reason of the great advance in the value of real estate in and about Bristol, and that its use and possession would now be of great benefit to him, to whom it rightfully belonged; that the whole of the said land described and embraced in the deed of June 18, 1848, is not necessary for the purposes strictly connected with the business of the said Norfolk and Western railroad, and that, by the terms and intentment of the said deed of June 18, 1848, the use of such and so much of the said land as is not strictly needed for the purposes of the said railroad belongs to him under the will of James King, the grantor, and he prays to be decreed to have the enjoyment of the same.

The Norfolk and Western Railroad Company demurred to the bill, and the cause having been submitted on the construction of the will of James King, and on the said demurrer, the court overruled the demurrer and gave leave to the Norfolk

Opinion.

and Western Railroad Company to answer. This the said company did do, filing its answer July 7, 1890, in which, among other denials, it denies that it went into, or could have gone into, possession of all the land conveyed by the deed of June 18, 1848, which undertook to convey three times as much land as the said James King had the right to convey. It denies that any considerable portion of the land which was properly conveyed by the said deed of June 18, 1848, is unoccupied and unused by it; but that it needs not only all the land derived from the said deed of James King, but, owing to its increase of business, needs a great deal more, for depots, switches, and other requirements. It denies that it is asserting a greater interest in, or enjoyment of, said land than it is entitled to; and it denies the right of the appellant, or other person claiming under the will of James King, deceased, to interfere with or question their possession, occupation, and control of the said land, the whole of which, even had there been the ten acres asserted in the said deed, would now be needed for the business of the road; that after the deed of June 18, 1848, the grantor, the said James King, by a deed dated June —, 1852, filed with their said answer, conveyed to the Virginia and Tennessee Railroad Company a certain tract or parcel of land commencing on the north side of the centre line of said road, and 185 feet from the said centre line, on the line between Samuel E. Goodson and King, and, running parallel to the said road, to the Tennessee line; thence along the State line to a like distance on the opposite side; then a parallel to said centre line to Goodson's line; thence along said Goodson line to the beginning; that the appellee, the said Norfolk and Western Railroad Company, holds and claims under the said deed, which was signed by the said James King and delivered to the Virginia and Tennessee Railroad Company, and that said deed covers all the land of which the said Norfolk and Western Railroad Company is now in possession, or was owned and conveyed by the said James King by his

Opinion.

deed of June, 1852, which said deed was made to correct the mistake and the omission in the deed of June 18, 1848.

Testimony was taken in the cause, and on the 14th day of February, 1892, the court, upon final hearing and determination, decreed that the *two* deeds—of June 18, 1848, and of June —, 1852—are both valid conveyances, and should be construed together; and that they invest the grantee with a fee simple title to the land of the grantor covered or embraced by them, or either of them, subject to certain restrictions and reservation, neither of which has been assailed as repugnant; and there is no allegation that any of the restrictions have been disregarded; and that, construing the said deeds, the Norfolk and Western Railroad Company has the exclusive title and absolute right to the use of said land for the purposes strictly connected with its business, except to erect buildings upon it for a residence of the agents or servants of the said company, or for any purposes than those strictly connected with the business of said railroad; and, upon the payment of the sum of \$250, the said Norfolk and Western Railroad Company will have the right to occupy not exceeding three acres of said land by the erection thereon of buildings for the accommodation of its agents and servants as residences. That under the reservation in the deed of the grantor to use any portion of the land not required by the railroad company for its purposes, yielding possession thereof whenever required or needed for the purposes of said company, the grantor, or those claiming under him, have no right to make any permanent changes in the property, but merely to use it in the condition in which it is, to cultivate and take from it such products as it may yield, and for that purpose he may enclose the part so cultivated, provided that the part so cultivated is not needed by the railroad company for use or for any of its purposes; and provided further, that no enclosure shall interfere with the rights of the railroad company in the use of the remainder of the land conveyed; but the grantor has no right to place any of said

Opinion.

property in such condition that he cannot yield it up in the condition in which he received it, when it is needed for the purposes of the railroad company.

The court decreed each party to pay his own costs, and directed a commissioner to execute and deliver to Joseph L. King a deed conveying to him the *residuum* of the real estate of James King, deceased, and saved to the appellant, Joseph L. King, his right to assert a claim or right to any land not included in the boundaries set out in the deeds of James King aforesaid to the Virginia and Tennessee Railroad Company. It is from this decree that this appeal is taken.

The deed of June —, 1852, was the necessary supplement of the deed of June 18, 1848, to correct a mistake and to supply an omission in the said deed of June 18, 1848; they embraced the same subject matter, between the same parties, and related only to the same transaction; and the circuit court did not err in holding both of the said deeds valid, and in construing them together.

The deed of June, 1848, refers to the line of the road as then located, because it was not granted until after the fall of 1852 or 1853; and the line as located at the date of both deeds was a straight line or a tangent to the State line, and the track when it was first laid was a straight track to the State line, and it was afterwards curved to connect with the East Tennessee road, the track of which was laid after the track of the appellee was laid. The appellant claims that the boundary lines should curve as they approach the State line, because the main track of appellee's road, as it approaches the State line, has been made to curve to make connection and meet the exigencies of a through trade and travel; and, upon this contention, appellant bases his claim to the land in controversy—a small, triangular piece of ground between Main street, in Bristol (which is the State line), Front street, and the station grounds of the appellee. The circuit court did not err in deciding that the boundary lines shall stand as fixed by the con-

Opinion.

veyances, and not be shifted to meet any change of appellee's main track, which may be found necessary or desirable, in the course of its business, to meet the requirements of accommodating its track to connecting lines of transportation.

Appellant contends also that the appellee is not entitled to the ground covered by the deed, lying between Front street and the railroad track, because it is alleged to have been vacant, unenclosed, and unoccupied from the date of the deed to the present time.

The appellee has the right to use and occupy any or all of the said land, and that right cannot be affected by its being unenclosed, vacant of buildings, or unoccupied at any given time. It was the intention and the legal operation of the deed to grant and to acquire, respectively, land to be subsequently used as the needs and enterprise of the grantee should develop. The grantor's use is, by the express terms of the deeds, subject, at any and at all times, to the right of the grantee to take possession whenever the lands should be needed by the company. The decree complained of defines the respective interests of the appellant and appellee in the lands covered by the deeds and in controversy between the appellant and the appellee, and this was all as to which the said parties litigated and the court could decree between them. The decree is as definite and certain as was necessary or proper upon the controversy between the appellant and the appellee; and the court did not err in not ascertaining what part and how much of the land was necessary for the railroad purposes of appellee. The exigencies of business may, at any time, require a railroad company to change or to enlarge its terminal arrangements and facilities, and its duties to the public as common carrier may require it to increase its tracks and extend its accommodations; and the court could not undertake to fix definitely the *mutatis mutandis* discretion of the appellee to use and control any part of the land conveyed whenever any part of it should be needed or required by it, as expressly provided in the deed.

Opinion.

When the court directed its commissioner to convey to appellant the residuum of the land of James King, outside of the deeds of June, 1848, and June, 1852, it did all that it could do in the cause, and we find no error in the decree appealed from to the prejudice of the appellant.

The appellee, however, complains of so much of the said decree as charges it with its own costs, and we think the error so assigned should be corrected under the rule in favor of the appellee; and our judgment is that the decree appealed from, thus corrected, shall stand affirmed.

DECREE AFFIRMED.

Wytheville.

DEATON v. TAYLOR.

JULY 20th, 1893.

1. MINES—*Lease—Forfeiture—Waiver.*—The right to insist upon forfeiture of coal lease for breach of condition subsequent, *held*, waived by the lessor recognizing lessee's right to assign the lease.
2. *IDEM—Royalties—Transportation.*—Lease of coal mine is not forfeited by failure to make the required output or pay royalties, when the lease provides that failure to get transportation shall excuse the making of such output, and transportation was not obtained and the payment of royalties was waived as provided in the lease. 2 Minor, 697.
3. PRACTICE AT COMMON LAW—*Demurrer to Evidence—Joinder in.*—Where it would be the duty of the trial court to set aside a verdict in favor of the defendants, *held*, defendants may properly be compelled to join in a demurrer to the evidence. *Trout v. V. & T. Railroad Co.*, 23 Gratt., 630.

Error to judgment of circuit court of Tazewell county, rendered January 21, 1892, in an action of debt on a note given for the balance due upon the assignment of a mining lease of coal lands, in which action Joseph Taylor was plaintiff and J. A. Deaton and others were defendants. The judgment being for the plaintiff, the defendants brought the case here on writ of error and *supersedeas*. Opinion states the case.

Henry & Graham, for plaintiffs in error.

Chapman & Gillespie, for defendants in error.

HINTON, J., delivered the opinion of the court.

Opinion.

In May, 1885, the Simmons Creek Coal Company, a corporation chartered under the laws of the State of West Virginia, leased to Joseph Taylor & Co., a firm composed of Joseph Taylor, Michael H. O'Connor, and Thomas O'Connor, a certain tract of coal land lying in Mercer county, West Virginia, for a period of twenty-two years.

By the terms of the lease the buildings and other improvements to be erected by the lessees were to be so located and constructed as to preserve the proper and convenient entry of the Norfolk and Western railroad track, and the lessees were to pay during the continuance of the lease, for royalty as rent, ten cents for each ton of 2,240 pounds of coal mined for any other purpose than the manufacturing of coke, and fifteen cents for each ton of coke made on the premises. It was also provided that sixty days were to be allowed in which to put the works in operation for the shipment of coal, and that for the first year the lessees were to pay a royalty based upon an output of 15,000 tons, and for the second year upon an output of 30,000 tons, and for every year thereafter, during the existence of the lease, an output annually in such quantity, not less than 30,000 tons, unless the lessees are prevented from mining by strikes among the laborers, or failure to get transportation for the coal, as to demonstrate the ability of the lessees to take out the whole body of the coal on said premises within the term. It is further provided that if the lessees fail to make the coal output annually as therein required, or to pay the rents and royalties, then their failure to do either of these things shall work a forfeiture of the lease without any legal proceedings; but that the lessors might waive this forfeiture for non-payment of rents and royalties and pursue the remedies therein provided for the collection of the same.

In August, 1885, Taylor sold his interest in said lease to one Sampson Smith, but subsequently, in the month of November of that year, he purchased the two-thirds interest of the O'Connors.

Opinion.

On the 28th day of August, 1886, Joseph Taylor assigned this two-thirds interest to J. C. Moore, G. T. Deaton, James A. Deaton, and L. T. Atkinson, in consideration of the sum of \$2,000, \$1,250 of which was paid as it fell due, leaving a note for the balance of \$750 still outstanding and unpaid.

In the contract of assignment, Taylor covenants that the lease is free from incumbrances, and that no act of his heretofore performed has or will cause a forfeiture of the same; and the Deatons, Moore, and Atkinson agree that they will take upon themselves and stand to and perform all the covenants set forth in said lease.

The note for the balance of \$750, referred to above, not having been paid at maturity, Taylor instituted his action of debt against the surviving obligors, J. A. Deaton, G. L. Deaton, and L. T. Atkinson, and, after three mistrials, recovered a judgment in the circuit court of Tazewell county.

From this judgment the plaintiff in error obtained a writ of error from one of the judges of this court. In the circuit court the defendants, by two special pleas, set up the defences—first, that the plaintiff and the O'Connors had forfeited their rights by their failure to pay the royalties and to make the output of coal required by their contract, and so had nothing to convey on the 28th of August, 1886; and second, that on account of the said forfeiture the Simmons Creek Coal Company entered and took possession of the leased premises and deprived the said defendants of the same. And they insist upon the same line of defence in this court. In brief, the contention of the plaintiffs in error is, that the lessees in the original lease of May, 1885, failed to carry out the covenants of the lease, and that by said failure that lease, by its terms, became absolutely, null, void, and at an end; and, therefore, that Taylor had nothing which he could sell or assign by the contract of the 28th of August, 1886.

At the trial the plaintiff demurred to the evidence, and the

Opinion.

court compelled the defendant to join in the demurrer, and this is assigned as an error by the plaintiffs in error.

Ought this to have been done?

According to our practice either party, plaintiff or defendant, has a right to demur to the evidence, and the other party will be compelled to join therein, unless the case be plainly against the demurrant, and his object seems to be nothing else but delay. But the power of the court to compel a joinder in the demurrer is one requiring the exercise of judicial discretion, and, when exercised, is subject to be reviewed by this court (4 min. pt. 1, m. p. 749). *Trout v. Va. & Tenn. R. R. Co.*, 23 Gratt., 630; *Eubank v Scott*, 77 Va., 206. In the present instance there was plainly no abuse of the power. There had been three mistrials, and the case certainly was not plainly against the demurrant. The purpose of the demurrant was not to retard but to expedite the trial of the case; and as the evidence was not clearly against him, and there is no doubt as to the facts proved by, or the proper inferences deducible from the evidence, the demurree could not possibly have been prejudiced. Indeed, as will appear in the result, the case was one in which it would have been the duty of the court to have set aside the verdict, if one had been rendered for the demurree, and, therefore, according to the views of Judge Moncure, in *Trout v. Va. & Tenn. R. R. Co.*, *supra*, exactly the case in which a joinder in the demurrer ought to be required by the court.

This brings us to the real inquiry in the case, which is this: Had the lease been forfeited before the assignment to the defendant? Now the contract, although dated on the 28th February, 1885, was really executed in the month of May in that year, and according to the deposition of Joseph Taylor, the firm of Joseph Taylor & Co. was ready to ship coal within thirty days from the time the lease was signed, if they had had transportation for the coal. And it appears, from the same deposition, that they had put upon the leased premises over

Opinion.

\$3,000 in improvements within the same period. In answer to the second question, the deponent says: "At the time we took the lease the property was all in woods. We cleared or cleaned up enough to make our openings, and for the railroad probably four acres in all. We also made five drift openings and drove them in, say fifty feet each, and timbered the same at a cost of about \$50 each. And we also built five log houses, costing \$100 each, amounting to \$500. And we built five log houses, costing \$25 each, amounting to \$125. We also built one blacksmith shop, costing \$40, and graded 800 feet of railroad at a cost of about \$800; 1,200 feet of mining track at a cost of \$600; built two dumps to dump the coal out of the mining cars into the railroad cars, costing \$50 each. We also had 2,000 mine ties made at a cost of three cents each, amounting to \$60. We had ten tons of steel rails at \$38 per ton, amounting to \$380, and two tons blacksmith iron, costing about \$38 per ton, amounting to \$76. We also paid \$83 railroad freight on the above mentioned steel and iron, and had our mine tracks laid from the dumps to all the drifts; all of which was done before the first of June, 1885." Here the items of expenditure are set forth in detail. Is it possible that the defendants would have failed to disprove them if it could have been done? These improvements, it should be added, were made under the directions of the engineer of the Norfolk and Western Railroad Company, and immediately thereafter "the plaintiff went to Roanoke to try to get the railroad authorities to lay the track, so that coal could be shipped; but at that time, in June, 1885, was told that the track would not be laid until the railroad company had a sufficient deed for the right of way, and this deed was not executed until the 2d October, 1886.

These facts are sufficient to show that prior to the sale to the plaintiffs in error, Taylor & Co. did not have transportation for the coal, and as a consequence could neither make the required output nor be expected to pay the royalties, which latter ground

Opinion.

of forfeiture the Simmons Creek Coal Co. expressly reserved the right to waive, as it seems to have done. And under these circumstances we do not think that the lease was forfeited, especially as the lease provides that there shall be no forfeiture if the failure to make the output should be due to a strike among the laborers, or a failure to get transportation, and "that the parties, evidently meaning the Simmons Creek Coal Company, may waive their forfeiture for the non-payment of rents and royalties," &c., which last provision could only have been put in to emphasize the fact that it was to be optional with the Simmons Creek Coal Company whether the failure to pay the rents and royalties should work a forfeiture or not, for otherwise this provision would have been useless, since a party may always waive a provision made for his benefit.

Formerly there was a distinction between leases which were declared to be void upon the breach of a condition, and such as were only voidable, but that distinction seems to have been overruled by the later authorities. At section 492 of Taylor's Landlord and Tenant, that learned author says: "There was, however, a distinction formerly drawn between leases that were declared to be void upon a breach of condition, and such as were to be voidable only. In case of a lease for lives, if the lessee was guilty of any breach of the condition, the lease was only voidable, although, by its express terms, it was to become thereby absolutely void; and the landlord might waive his right to re-enter, by the acceptance of rent, or of some other act, which amounted to a dispensation of the forfeiture. But, upon the breach of such a condition in a lease for years, the lease became *ipso facto* void, and no subsequent recognition could set it up again. Yet if the condition in such case was merely that the lessor might re-enter, the lease was voidable only, and might be affirmed by acceptance of rent, if the lessor had notice of the breach at the time. But the force of this distinction has been almost, if not quite, abated by the modern decisions, which establish that the breach of a condition making

Opinion.

a lease void upon a certain event, is to make it void at the option of the lessor only, in case where the condition is intended for his benefit, and he actually avails himself of his privilege."

See, also, 2 Minor's Institutes, page 697, where it is said: "A condition avoiding a lease upon a contingency (*e. g.*, the lessee's non-payment of rent), according to the modern authorities, does not render the lease absolutely void, *ipso facto*, though it be expressly so declared, for that would be to enable the lessee, by his own misconduct, to determine the lease at his pleasure, but it leaves the lessor the option of entering for the breach of conditions or not, at his will; and the lease being thus voidable only, and not void, it is confirmed by the lessor's subsequent acceptance of rent, or other unequivocal waiver of the forfeiture."

And in Tyler on Ejectment, page 312, it is said: "It may be affirmed as a general proposition that whatever acts of the landlord will be a waiver of a forfeiture for non-payment of rent, will be a waiver for any other cause." 1 Pomeroy Eq., sec. 541, and note. And as to what acts may constitute a waiver, see Taylor on Landlord and Tenant, sections 497 and 498. And in the present case, there can be no doubt that the coal company waived its right to insist upon a forfeiture, if there had been any, when it recognized the right of Taylor to make the assignment to the defendants.

Nor are the defendants in a condition to plead any such forfeiture; that neither they nor the Simmons Creek Coal Company ever formally declared or treated this lease as forfeited until the 4th day of January, 1887, long after the defendants had taken possession of the leased premises and had begun to ship coal, is clear from the record. And while nothing appears showing the least want of the utmost good faith on the part of the plaintiff in his transactions with the defendants, it plainly appears that the defendants were fully acquainted with all the facts in relation to the lease before they purchased, and

Opinion.

that they refused to purchase the lease from the plaintiff, Taylor, until they had failed to get a new lease from the Simmons Creek Coal Company itself, and had consulted with the president and other officers of said company with reference to the supposed forfeiture. And after such consultation, and after receiving assurances from the president of the company that all they had to do was to go to work and show their ability to carry out the provisions of the lease, and that no advantage would be taken of any forfeiture or past misconduct on the part of Taylor & Co., they purchased from Taylor his interest in the lease, paid in cash \$500, gave their notes for the remainder of the purchase-money, and took possession of the leased premises.

Now, under these circumstances, I repeat, they took possession of the leased premises, went to work, and had actually shipped coal therefrom, and then, after they have quarrelled among themselves, and not before, they abandon their contract, and now seek to visit a *forfeiture of their own creation* upon the plaintiff Taylor. This cannot be done. To permit them to throw the consequences of their own default upon the plaintiff would operate as a fraud upon him, although he seems to have acted with the utmost good faith towards them, and this they are estopped from doing.

After a careful examination of the record, we are satisfied that the judgment of the circuit court of Tazewell county is right, and must be affirmed.

JUDGMENT AFFIRMED.

Wytheville.

WOHLFORD v. TRINKLE.

JULY 26th, 1893.

CHANCERY PRACTICE—*Rehearing—Case at bar.*—A rehearing of suit for sale of lands after the sale has been made and confirmed, on the ground that one of the defendants had not been served with process, will not be allowed, although she testified positively that she was not served, and no trace of the case appears either on the process book or rule book, where the decree recites that process had been served on all the defendants. There are endorsements on the bill as if rules had been taken; the deputy clerk testified that he issued process against her; an order of publication containing her name was duly published in a newspaper; the deputy sheriff testifies that he served process on her at her home, and returned it to the deputy clerk; and one witness testifies that he had seen a summons for her which appeared to have been returned "executed."

Appeal from three decrees of circuit court of Wythe county, rendered August 19, 1891, September 22, 1891, and March 10, 1892, in chancery causes, in one whereof George M. Wohlford and others were complainants and John Grubb, Mrs. L. M. Trinkle and others were defendants, and in the other the said Mrs. L. M. Trinkle was complainant and said George M. Wohlford and others were defendants. The decree of the circuit court sustained Mrs. L. M. Trinkle's claims to the land and dismissed the bill of Wohlford and others. From this decree Wohlford and others appealed. Opinion states the case.

Blair & Blair, for appellants.

Walker & Caldwell, for appellees.

LEWIS, P., delivered the opinion of the court.

The appellants filed their bill in the court below for a sale of a certain parcel of eighteen acres of land, situate in Wythe county. This land formerly constituted a part of a tract of 106 acres of which Jacob Wohlford died seized in 1862. The deceased died intestate, leaving five children, his heirs at law, to whom, at his death, the land descended. Afterwards the land was divided among the heirs, when the eighteen acres in controversy was allotted to Kathrine Wohlford, who intermarried with James Stephens. The bill states that Priscilla Wohlford, another daughter of Jacob Wohlford, who intermarried with Timothy Reardon, acquired the interest of Kathrine Wohlford, and afterwards died intestate, whereupon the land descended to the appellants, as her heirs at law. The bill also states that the appellee, Mrs. L. M. Trinkle, "sets up some sort of claim to the said eighteen acres," and she and others, some of whom are non-residents, are made defendants to the bill.

The suit was commenced on the 27th of June, 1887, and at the following September term the cause was placed upon the docket. At the same time a decree was entered upon the bill taken for confessed, which, after reciting that *process had been executed on all the defendants*, directed the land to be sold. The land was afterwards sold, pursuant to the terms of the decree, and at the March term, 1888, the sale was confirmed.

Afterwards the appellee, Mrs. Trinkle, filed a petition for a rehearing, denying that process in the suit had been served on her, or that she had in any way been notified of the pendency of the suit until after the last-mentioned decree had been entered, and praying that all the orders and proceedings in the cause be set aside and annulled. On the 19th of August, 1891, an order was entered granting the prayer of the petition, and

Opinion.

giving leave to the petitioner to file her answer to the bill, which she did. Depositions were taken, and when the cause came on to be finally heard, her claim to the land was sustained, and the bill dismissed with costs.

The single question to be determined is whether the recital in the decree of the September term, 1887, that process had been executed on all the defendants, including Mrs. Trinkle, is true. No question is raised as to the service of process on any other party; nor can it be successfully denied that the *onus* was upon her to establish the averment in her petition that she had not been notified of the suit.

The proceedings before the cause was put on the court docket were certainly very irregular. Indeed, it is hard to imagine a greater state of confusion in a clerk's office than the evidence shows existed in the clerk's office of the court below, when, and for some time before, the present suit was commenced. There is no trace of this case to be found either on the process book or on the rule book, although there are endorsements on the bill as if rules had been taken. But no objection as to the irregularity of the proceedings was taken until the appellee filed her petition for a rehearing after there had been an adjudication of the merits of the case—that is to say, until after a sale of the land had been ordered and confirmed.

The appellee testifies positively that she was not served with process, and there is no process to be found in the record. The witness, however, for the appellants, Clemmens, who was deputy clerk at the time the suit was instituted, testifies that he issued process according to the memorandum for the suit, which appears in his handwriting on the memorandum book; and included among the names of the defendants in this memorandum is that of Mrs. Trinkle. It also appears that there was an order of publication, which was duly published in a Wytheville newspaper, which also embraces the name of Mrs. Trinkle. The deputy sheriff, moreover, testifies that he served

Opinion.

process on her at her home in Wytheville, and returned the process to the deputy clerk from whom he received it. Several of the defendants testify that process in the suit was served on them, and one of the witnesses for the appellants testifies that he saw among the papers in the cause, before it was put on the court docket, a summons for Mrs. Trinkle, which appeared to have been returned "executed."

This is the substance of the evidence for the appellants, which, taken in connection with the weight to be given to the recital in the record that process had been served on all the defendants, constrains us to the conclusion that the circuit court erred in granting the prayer of the appellee's petition for a rehearing, and in subsequently dismissing the bill.

The evidence for the appellee, independently of her own deposition, shows little more than what appears from the evidence for the appellants. Thus, Foster, who was clerk of both the circuit and county courts, but who was chiefly engaged in the clerk's office of the county court, testifies to the very loose and careless way in which the business in the clerk's office of the circuit court was conducted by his deputies for some time before the present suit was instituted. He says important papers were often lost or misplaced, and that he has been unable, after making search, to find any process in the present case. He admits, however, that he himself made the endorsement on the bill: "August rules, 1887, bill filed; O. P. executed, and D. N. as to adults upon whom process has been executed," and that at the following September rules he made the further endorsement: "D. N. as to adults on whom process has been served," which last endorsement, he says, was intended to be decree *nisi* confirmed. He says further he made these endorsements in that peculiar manner because he did not know of his own knowledge that process had been served, though he supposed it had been from the memorandum made by the deputy, and the statements to him of the plaintiffs' attorney.

Opinion.

The law applicable to a case of this sort is so well settled that we need only refer, without comment, to *Hill v. Woodward*, 78 Va., 765; *Ferguson's adm'r v. Teel*, 82 *Id.*, 690, and *Moore v. Green*, *ante*, p. 181.

The point was made in the argument for the appellee that, inasmuch as no rules were regularly taken in the case, the circuit court had no jurisdiction of it. But this is clearly a mistaken view. The object of rule-days is merely to expedite the maturing of causes in vacation, and the rules that are taken in a cause are orders of court, though made in the clerk's office. Accordingly, section 3293 of the Code expressly gives the court control over all proceedings in the office during the preceding vacation. It is also provided that the court may reinstate any cause discontinued during such vacation; set aside any of the proceedings, or correct any mistake therein, and make such order concerning the same as may be just. Nothing, therefore, could have been further from the intention of the legislature than to make the jurisdiction of the court dependent upon the regularity of the proceedings in the office.

We say nothing as to the title to the land in controversy, because, if the appellee was served with process in the suit, that question does not properly arise on this appeal. The sole ground upon which the decrees ordering and confirming a sale of the land were sought to be re-heard was that she had not been served with process; and as, in our opinion, that fact has not been established, no other question is open for consideration. There is nothing, in other words, in the petition for rehearing to bring the case within the general rule in regard to applications to rehear interlocutory decrees on matters of fact. That rule is that the petition must set forth the discovery of new evidence, and must be supported by affidavit that such after-discovered evidence could not have been brought forward by the use of reasonable diligence before the decree was rendered. *Armstead v. Bailey*, 83 Va., 244; *Whitton v. Saunders*, 75 *Id.*, 568.

Opinion.

It follows that the decree granting the prayer of the petition for rehearing and the subsequent decrees complained of are erroneous and must be reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

DECREES REVERSED.

Wytheville.

HIGGINBOTHAM v. MAY AND AL.

SAME v. BANK OF PRINCETON AND AL.

JULY 26th, 1893.

1. **EQUITABLE JURISDICTION AND RELIEF—Cancellation of Satisfaction of Judgment—Attorneys.**—A suit to cancel satisfaction of judgment, on the ground that it was procured by fraud or mistake, may be maintained by the attorneys who obtained the judgment.
2. **IDEM—Judgment Creditors—Enforcement of Lien.**—A suit to enforce lien of judgment, if found subsisting in suit to cancel satisfaction thereof, may, during pendency of latter suit, be maintained by the owners of the judgment, in the nature of a cross bill.
3. **PAYMENT BY NOTE—Case at bar.**—Holder of note sending it to attorneys with instructions to renew, if possible, but otherwise to sue, and after judgment is obtained receiving from them new note and money, with intimation that if a small balance is soon paid they will receive it in satisfaction of the judgment, which holder accepts and announces the balance due, but doing nothing further for five years, thereby ratifies the act of the attorneys in endorsing the judgment as "satisfied."

Appeal from decree of circuit court of Tazewell county, entered August 26, 1892, in a cause wherein A. J. & S. D. May were complainants and J. B. Higginbotham and T. W. Wingo were defendants, and in another cause wherein the Bank of Princeton was complainant and said Higginbotham and Wingo were defendants. From the decree in favor of the complainants in both suits, which were heard together, the defendant, Higginbotham, appealed. Opinion states the case.

Fulton & Fulton and Chapman & Gillespie, for appellant.

VOL. xc—30

Opinion.

Henry & Graham, for appellees.

HINTON, J., delivered the opinion of the court.

The first of these suits was brought by the Messrs. May, as attorneys, to have cancelled an endorsement of the satisfaction of a judgment of the Bank of Princeton against the appellants, J. B. Higginbotham and T. W. Wingo, upon the ground that said endorsement had been caused by a misrepresentation of the said Higginbotham, or by mistake.

The second suit was brought by the Bank of Princeton against the said Higginbotham and others to enforce the lien of the judgment referred to in the first named cause.

There was a demurrer to the bill in each cause, which was properly overruled. The objects of the suits were distinct, and the simplest and most convenient method for having the rights of the respective parties determined was the one which has been adopted, namely, to have two suits and have them heard together. Had the object of the Messrs. May been to have the entry of satisfaction stricken off for fraud or mistake it might have been accomplished by motion to the court. 2 Black on Judgments, sec. 1016. But here the Messrs. May desired to do more than this. They wished not only to have the entry expunged, if the court should be of opinion that it was procured by fraud or caused by mistake, but they also desired that the loss should be placed where it ought properly to fall. A suit in equity was therefore the only proceeding by which all this could be done, and A. J. & S. J. May, who were personally interested in the result, were competent to bring it. See Story on Agency, sec. 416.

As to the second suit it is to all intents and purposes a cross bill, and should be so treated in this case. A cross bill, *ex vi terminorum*, implies a bill brought by a defendant in a suit against the plaintiff in the same suit, or against other defend-

Opinion.

ants in the same suit, or against both, touching the matters in question in the original bill. A bill of this kind is usually brought either (1) to obtain a necessary discovery of facts in aid of the defence to the original bill, or (2) to obtain full relief to all parties, touching the matters of the original bill. Story's Eq. Pl., § 389. Here the object was to obtain full relief to all parties, especially to the Bank of Princeton, by enforcing the lien of the judgment if it should be found to be subsisting. A proper case for a court of equity was therefore disclosed by each bill, and the demurrers were, therefore, as we have before said, properly overruled.

This brings us to consider the case upon the merits.

It appears by the record that on the 31st day of July, 1884, T. W. Wingo made his negotiable note for \$500 at ninety days, which was indorsed, for accommodation, by the payee, J. B. Higginbotham, and discounted by the Bank of Princeton, of Princeton, West Virginia. After maturity of the note, the bank having been notified by Higginbotham to collect the note, sent it to A. J. & S. D. May, lawyers at Tazewell, Va., for collection, stating at the same time that they preferred to renew the note, but that if this was not done they should bring suit. At first Higginbotham declined to further indorse for Wingo and renew the note, and an action at law was therefore brought on the note, and a judgment was rendered therein at the November term, 1885, of the circuit court of Tazewell county. This judgment was for the sum of \$500 with interest thereon from the 1st day of October, 1884, and \$7 65 costs.

Shortly after this judgment was rendered, Higginbotham decided to again endorse for said Wingo, so as to enable him to pay off said judgment; and accordingly a new note for \$500, negotiable and payable at said Bank of Princeton, dated on the 1st day of November, 1885, and falling due on the 1st day of May, 1886, was made by said Wingo and endorsed by said Higginbotham.

Opinion.

This note was made in the law office of A. J. & S. D. May, the attorneys for the bank, and at the time the said attorneys made a calculation of the amount which, together with the new note, the bank would be willing to receive in satisfaction of the judgment, and Higginbotham then gave his check for \$38 80, which, with the amount in bank to the credit of Wingo, it was supposed would be sufficient to meet the demands of the bank. The attorneys immediately forwarded the note and check in a letter addressed to the president of the bank, the body of which reads as follows:

"We got judgment on the note of T. W. Wingo, endorsed by J. B. Higginbotham, for \$500, due 1st November, 1884. After the judgment was rendered, Wingo and Higginbotham agreed to settle it by new note and payment of interest and costs. Enclosed find their note for \$500 and check for \$38 80, which leaves \$38 32 due the bank on interest, and \$8 28 cost. Mr. Wingo promised to pay the balance several days ago, but has not done so; doubtless he will this week; if he does not, we will sue out execution on the judgment and collect it. Below find statement."

The statement is as follows:

Principal of note due 1st Nov. '84,	-	-	-	\$500 00
Interest from Nov. 1, '84, to May 1, '85,	-	-	-	25 00
Interest from May 1, '85, to Nov. 1, '85,	-	-	-	26 66
Interest from Nov. 1st to May 1, 1886,	-	-	-	25 46
				<hr/>
				\$577 12
Cr. check,	-	-	-	38 80
				<hr/>
				\$538 32
Note due May 1, '86,	-	-	-	500 00
				<hr/>
Bank on interest still due,	-	-	-	\$38 32

Opinion.

The bank, by its cashier, at once answered said letter, in which it said: "I credit T. W. Wingo \$38 80, and as he has \$37 58 to his credit, paid before the note went into your hands, he will only have to pay 74 cents and costs of suit to renew his note."

Soon after this letter was received by said attorneys for the bank, Higginbotham paid them the balance due on the judgment, and said attorneys marked the judgment, at the instance of Higginbotham, as they claim, "satisfied" on the lien docket of the county of Tazewell.

The balance of the judgment, after delivery of the note and the payment of the \$38 80, was paid to one J. D. Alexander, upon an order drawn by A. J. May on J. B. Higginbotham, and with the order was attached on account of certain items due from Higginbotham, and among them is "balance upon judgment, \$12," the reference admittedly being to the judgment of the Bank of Princeton against Wingo, mentioned above. The balance of the judgment having been thus paid, Higginbotham seems to have heard nothing more of the matter until he was notified in the summer of 1891, by the attorneys for the bank, that the bank claimed that the judgment had not been settled and that he should pay off the same; and Higginbotham declining to do this, A. J. & S. D. May instituted their suit, alleging that the entry of satisfaction had been obtained by misrepresentation and fraud on the part of Higginbotham.

Shortly after the suit was brought by A. J. & S. D. May, the Bank of Princeton filed its bill, whereupon Higginbotham offered a plea setting forth the pendency of the first above-styled suit, which the court refused to allow him to file, doubtless because it took the view we have just announced, that the second bill was essentially a cross-bill, and was required in order that full relief might be obtained by all parties touching the matters of the original bill.

Opinion.

Now, from what has been said, it is clear that it was understood between A. J. & S. D. May and Wingo and Higginbotham that the new note was to be received as payment of the principal of the judgment, and it was doubtless a consciousness of this agreement which induced the attorneys to make the entry on the judgment lien docket, "Satisfied, 1888, and money paid bank," which was but a short way of saying that the note and money received in satisfaction of the judgment had been paid over to the bank, at least so much thereof as the bank was entitled to. Under the general authority of an attorney, the Messrs. May had authority to collect the judgment, and when collected, it became their duty to mark the judgment satisfied; and while they had under this general authority no right to collect the judgment in anything but money, unless by special authority; yet if, acting under their general authority, they have done so, and their act has been ratified, it binds the principal. *Smith v. Lambert*, 7 Gratt., 138; *Johnson v. Gibbons*, 27 Gratt., 632.

Has this arrangement of their attorneys been ratified by the Bank of Princeton? Immediately after the judgment was obtained, Higginbotham agreed to pay off the judgment in the mode which has been indicated, and in pursuance of this agreement, he executed a note for \$500 and gave his check for \$38 80. This new note and money was at once forwarded to the Bank of Princeton, together with a full statement and an intimation too plain to be misunderstood, that the balance, if paid in a short time, would be received in settlement or discharge of the judgment.

Now, what did the bank do? Did it make the slightest objection to the proposed action of its attorney? No; on the contrary, it credited the principal debtor with the amount paid, entered the note on the books of the bank to the credit of the maker, T. W. Wingo, and held it for five years, without one word of dissent. It had previously indicated its objec-

Opinion.

tion to a suit except as a dernier resort. By its silence it now gives its tacit approval to the extinguishment of the judgment. What the bank wanted was not a judgment, but a new note upon which it might continue to get interest at the rate of 10 per centum. The agreement to accept the new note, and the payment of all the usurious, especially the back, interest, and the costs, in full settlement of the debt, which was fully brought home to the bank by the letter from their attorneys, which has been heretofore set out in this opinion, constitute as complete a novation of the contract as it was possible to make, and the acceptance of the note, crediting it on the account of T. W. Wingo, and their failure to intimate the slightest objection to what their attorneys had done and were going to do (for the seventy-four cents and costs were not collected until afterwards), accompanied as it was by a silence which lasted until the note was out of date, must certainly be deemed a ratification of the transaction, if any conduct can possibly amount to a ratification. In *Law v. Crop*, 1 Black's R., 539, Mr. Justice Greer, speaking for the whole court, said: "When informed by his agent of what he had done, if the principal did not choose to affirm the act, it was his duty to give immediate information of his repudiation. He cannot, by holding his peace and apparent acquiescence, have the benefit of the contract if it should turn out to be profitable, and retain a right to repudiate it if otherwise. The principal must, therefore, when informed, reject within a reasonable time, or be deemed to adopt by acquiescence." These remarks are as applicable to this case as to that. *Johnson v. Gibbons*, 27 Gratt., 636; *Cuffman v. Bruffy*, 26 Gratt., 698.

Upon the whole case it is clear that the judgment has been paid off, and that the Messrs. May were fully justified in marking the same "satisfied," and that the only rights the Bank of Princeton has, if any, which it can now enforce, must be upon the note. We attach no importance to the fact that Higgin-

Opinion.

botham thought, or pretended to think, that he had paid this note, for even if his claim was knowingly unfounded, it could not affect the result, which had been determined and fixed by what preceded.

The decree of the circuit court of Tazewell is wholly erroneous and must be reversed and annulled, and a decree must be entered in accordance with the views herein expressed.

DECREE REVERSED.

Wytheville.

SCOTT v. NORFOLK & WESTERN R. R. Co.

JULY 27th, 1893.

1. *CONTRACT—Parol evidence—Case at bar.*—Plaintiff by writing agreed to furnish defendant with railroad ties at points where needed, but alleged a contemporaneous parol agreement of defendant to haul part of the ties. In action for defendant's failure to perform the parol agreement: *held*, such agreement could not be proved as it would violate the rule which forbids the admission of parol evidence to vary a written agreement.
2. *IDEM—Receipt—Release.*—Plaintiff accepted payment and receipted in full of all demands under the contract for such ties as he hauled: *held*, such receipt was a complete defence to the plaintiff's action.

Error to judgment of circuit court of Tazewell county, rendered August 26, 1892, in an action of *assumpsit* wherein Charles Scott, Jr., was plaintiff, and the Norfolk and Western Railroad Company was defendant. Opinion states the case.

Henry & Graham, for plaintiff in error.

A. J. & S. D. May and *John H. Fulton*, for defendant in error.

LACY, J., delivered the opinion of the court.

This action was trespass on the case in *assumpsit* by the plaintiff in error against the defendant in error.

The case is briefly as follows: Charles Scott, Jr., the plain-

Opinion.

tiff, was a contractor with the railroad company to furnish a large number of cross-ties to be used in the construction of its Clinch Valley division. He was to furnish 170,000 cross-ties on the line of the Clinch Valley division within a certain time at 33 cents. No question arises as to this; the cross-ties were not all furnished, but such as were furnished were paid for in full, and the contractor's receipt given for the payment in full, and the company released from all further liability under and concerning the said contract, which was in writing with the purchasing agent of the railroad company.

This suit is brought to obtain damages from the said company for its failure to comply with a verbal undertaking by one Coe, chief engineer of the company, made contemporaneously with the written contract, that 25,000 of these cross-ties should be hauled by the company on its trains from the New River division of the company.

It is claimed that Mr. Coe wrote a letter to this effect, which has been lost.

The company denied any such agreement, and insisted that it had made only one contract with reference to these ties, which was in writing, and which contained no such stipulation, and with which contract it had complied in full.

The case was tried by a jury, which, under the court's instructions, rendered a verdict for the defendant; whereupon the plaintiff moved the court to set aside the verdict and grant him a new trial, because of misdirection by the court on the law, because of the exclusion of certain evidence, and because the said verdict was contrary to the law and the evidence. This motion the court overruled, and the plaintiff applied for and obtained a writ of error to this court.

The first assignment of error is as to the ruling of the trial court in excluding the contemporaneous agreement alleged between the parties, by which a material condition and contradictory agreement contemporaneous with the written contract was sought to be attached to it, and interpolated in its provisions.

Opinion.

The written contract provided that the cross-ties should be placed on the line of the road where they were wanted, not above or below grade more than specified. By the parol proof offered it was sought to show that the parties had contracted that these ties should be placed many miles away and hauled to the place when they were wanted and placed by the company.

If there had been any such agreement as this, when its grave importance is considered, involving a large sum of money, and an enormous saving to one of the contracting parties of trouble and inconvenience, being in the highest degree material to his interest and welfare, why was it not inserted in this formally prepared and elaborately constructed contract in writing, if mutually agreed on at the same time the written contract was agreed on? It clearly would have been among its most important provisions. When parties have deliberately put their engagements into writing, in such terms as import a legal obligation, without any uncertainty as to the object or extent of such engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, was reduced to writing; and all oral testimony of a previous colloquism between the parties, or of conversation or declarations at the time when it was completed, or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected.

In other words, as the rule is now more briefly expressed, parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument. *Greenlf. Ev.*, vol. 1, § 275; *Hubble v. Coles*, 85 Va., 504; *Bruce, &c., v. Slemp, &c.*, 82 Va., 352, and authorities cited; *Hughes v. Tinsley & Bro.*, 80 Va., 259.

This general rule is well established, and there is nothing in this case to take it out of it.

Opinion.

Aside from this the case is clearly with the defendant in error on the merits without its application, the plaintiff in error having receipted in full of all demands under the contract, and received payment for such ties as he hauled and delivered under the contract.

This release and receipt was rejected by the circuit court as immaterial, and the defendant in error assign such action as error against them under Rule IX. of this court it made a part of the record by bill of exceptions. It was a complete defence to the action of the plaintiff against them under the contract sued on, and they had a right to have it presented to the jury.

But this action not having prejudiced the defendant in error, and then there being no error in the record of which the plaintiff in error can complain, we will affirm the judgment of the circuit court of Tazewell county, appealed from here.

JUDGMENT AFFIRMED.

Wytheville.

NORFOLK AND WESTERN RAILROAD CO. v. DRAPER.

JULY 27th, 1893.

1. RAILROAD COMPANIES—*Fires—Damages.*—Verdict for \$1,600 for damages caused by fires set from locomotive will not be set aside as excessive where witnesses who examined the damage estimated it as more than twice that amount.
2. PRACTICE AT COMMON LAW—*New Trial.*—New trial on ground of newly discovered evidence will not be granted for evidence known before the trial, but omitted because the witnesses were believed to be hostile.

Error to judgment of circuit court of Wythe county, rendered February term, 1893, in an action wherein J. S. Draper was plaintiff and the Norfolk and Western Railroad Company was defendant. The object of the action was to recover damages for burning plaintiff's wood by fire communicated by defendant's locomotive. From the judgment for the plaintiff the case was brought here by writ of error and *supersedeas*. Opinion states the case.

Bolling & Stanley, for plaintiff in error.

W. S. Poague, for defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

Upon the trial of the case, the jury found a verdict for the plaintiff, and assessed his damages at \$1,600. The defendant moved the court to set the verdict aside and to grant to it a

new trial, on the ground that the verdict of the jury is contrary to the law and the evidence; which motion the court overruled, and entered judgment according to the verdict; to which action of the court the defendant excepted.

There was no objection made to the instructions given by the court upon the trial, and no question was made as to the law applicable to the case, and there is none presented by the record.

The evidence is certified, and the case is to be considered by this court as on a demurrer to the plaintiff's evidence.

The evidence shows that the lands of the plaintiff extend along the line of the defendant company's road for nearly three miles, and that, on the — day of May, 1891, and before that time, the "*right of way*" of the said railroad company was covered with dry grass, dry leaves and weeds, and other combustible matter which had accumulated and been left upon the said right of way, which was ignited by fires from the passing locomotives of the said defendant and communicated to the contiguous lands of the plaintiff, continuing to burn for several weeks, and over nearly the entire tract of 2470 acres, most of which was wood land with a valuable growth of pine, oak and chestnut on it.

Numerous and credible witnesses testify that they saw the fire originate in the dry and combustible matter upon the defendant company's right of way, and lumbermen and other witnesses who went upon the land and examined the ravage done by the fire to the plaintiff's wood land, estimate the damage at \$3,705. The jury gave by their verdict less than half of this. The estimation of damages is, peculiarly, the province of the jury, they being considered especially competent to determine such matters, and therefore it is particularly incumbent upon the court to forbear any encroachment upon the function of the jury in this particular, save in the strongest case of injustice * * *—the amount (of the verdict) must be so out of the way as to evince passion, prejudice, partiality or corruption

Opinion.

"in the jury." 4 Minor 757; *Benn v. Hatcher*, 81 Va., (Hansbrough) 25-33.

There was a motion to set the verdict aside and grant a new trial upon the ground of after discovered evidence, which motion the court overruled.

"A new trial is granted on the ground of after discovered evidence, not without great reluctance, and never, except under very special circumstances, which have been thus summed up. The evidence must appear to have been discovered since the former trial. It must appear that the evidence is such that reasonable diligence on the part of the applicant could not have secured it at the former trial. The evidence must be material in its object, and not merely cumulative and corroborative, nor collateral. The evidence must be such as ought to produce, on another trial, an opposite result on the merits." 4 Minor 758, *et seq.* 82 Va., (Hansbrough) 827. *Field v. Commonwealth*, 89 Va., 690. The alleged newly discovered evidence offered in this case is not newly discovered evidence, and fails to measure up to every requirement of the law. The bill of exceptions sets out the fact that the counsel for the defendant company knew of the existence of the witnesses and what they could prove before the trial, and that they did not summon them or make any effort to bring them before the court during three terms of the court, and when they were within sixteen miles of Wytheville, because they apprehended that they were hostile to the defendant company. They now move to set aside the verdict of the jury, to introduce these two witnesses whose integrity they avow they distrusted, to prove that the fire originated differently from the manner testified to by a host of the plaintiffs uncontradicted witnesses, and as admitted by the petition of the plaintiff in error.

The proposed new evidence has not been discovered since the trial; no diligence or effort whatever has been made by the counsel or by the defendant to produce it; it would be

Opinion.

only cumulative and inoperative to produce a different result upon a new trial; and it was properly overruled and rejected by the court.

There is no error in the record of the proceedings in the circuit court of Wythe county, and our judgment is to affirm the judgment complained of.

JUDGMENT AFFIRMED.

Wyntheville.

RICHLANDS IRON CO. v. ELKINS.

JULY 27th, 1893.

1. **EMPLOYEES—Risks—Instructions.**—In action by employee for personal injuries, it is not error to instruct that a servant entering upon dangerous employment assumes all incident risks, but not extraordinary risks arising from defective machinery, unless he has knowledge thereof, and chooses to remain in the employment.
2. **IDEM—Duty of Employer.**—Nor is it error to instruct that it is employer's duty to use ordinary care to provide reasonably safe and suitable machinery, and that in absence of notice to the contrary, employee is warranted in assuming that employer has performed his duty in so providing. *Improvement Co. v. Andrews*, 86 Va., 27.
3. **IDEM—Questions by Jury.**—After instructions to jury and they have retired and returned and stated their inability to agree, it is not error to give them further instructions upon questions submitted by them and discussed by court and counsel for both parties in absence of the jury.
4. **EMPLOYER—Defective Machinery—Case at Bar.**—Where employer leaves a large rapidly revolving cogwheel unprotected, so that tongs carrying large masses of iron are liable to be caught and taken into it and the pieces thrown all about the room with such force as to kill any person with whom they come in contact, after having been warned by a skilled workmen to encase it, such employer held liable for an injury to an employee resulting from the tongs catching in the cogs.
5. **VERDICT—Damages.**—A verdict of \$2,500 for an injury to an employee—breaking his skull so that a part has to be removed, leaving the brain unprotected—by which his capacity to work is very much impaired, held, not excessive.

Error to judgment of circuit court of Tazewell county, rendered at its November term, 1892, in an action of trespass on the case for negligent injury, wherein James Elkins, by his

next friend, was plaintiff and Richlands Iron Company was defendant. From the judgment for the plaintiff the defendant brought the case here on a writ of error and *supersedeas*. Opinion states the case.

A. J. & S. D. May and Chapman & Gillespie, for plaintiff in error.

Henry & Graham and John H. Fulton, for defendant in error.

LACY, J., delivered the opinion of the court.

This case is as follows:

At the time the cause of action arose, which was for personal injuries received by the defendant in error, who was an employee of the plaintiff in error, a corporation owning and occupying what is called a puddling or rolling mill, and was engaged in the process of reducing pig iron to wrought iron or muck bars. It is stated that this is done by placing 1200 pounds of pig iron into a furnace, and when the pig iron is smelted, it is then made into six different balls, or masses, and these by means of tongs attached to a trolley, and carried to a machine called a squeezer, and passing through the squeezer it then becomes what is called bloom, and this bloom is rolled into muck bars.

The machine which is called a squeezer is a machine with large wheels and cylinders which are kept in a rotary motion by means of an engine geared thereto.

The operation of carrying the molten metal to the squeezer and passing it through the squeezer is to some extent unavoidably dangerous, therefore all the employees in the mill had been warned, and knew full well, not to be near the squeezer when the molten metal was approaching it or going through it. This molten metal gave out a bright light as it approached the squeezer, which gave warning of its approach by a great

Opinion.

noise, and the peculiar noises of the trolley also gave warning of the approach of the metal. When the metal was in the squeezer there were explosions and loud cracking noises caused by the metal passing through the squeezer.

The plaintiff had been in the employment of the company as scale boy in the mill for about three months before the injury was inflicted. At the time of the injury to the plaintiff there was one iron bar in front of the squeezer, and at the bottom of the cogwheel above the squeezer, which had been put there to prevent the rod which attached the tongs to the trolley above from catching in the cogs of the wheel above the squeezer.

The rolling mill had been in operation about seven months prior to the accident, running day and night, an equivalent of fourteen months ordinary work by day, and in all that time the rod attached to the tongs had never caught in the wheel above the squeezer *until after the tongs* had caught in the squeezer and broken the rod.

At the time the accident occurred, one English was the helper who was carrying the metal to the squeezer, and immediately before, or just at the moment he placed the metal in the squeezer, he fell some six or eight feet to the left of the squeezer, holding the tongs in his hands, and this took the rod beyond the bar or guard fixed at the bottom of the cogwheel, which went only partially in front and around the said cogwheel. And in some way the rod caught in the cogs of the wheel over the squeezer, and the tongs were wrenched from the hands of English and hurled against the plaintiff, striking him in the front part of the head and breaking his skull, so that some of the bone had to be removed and the brain was left unprotected, by which he was greatly injured and his capacity to work very much impaired, but not entirely destroyed.

This action resulted, and upon the hearing the case was tried by the jury under the instructions of the court, and a verdict rendered in favor of the plaintiff for \$2,500. Where-

Opinion.

upon the defendant moved the court to set aside the said verdict of the jury, because the same was contrary to the law and the evidence, and because of the misdirection of the court. But the court overruled the motion and rendered judgment on the verdict, and the defendant applied for and obtained a writ of error to this court.

The first question arises here on the instructions of the court. The court was asked for instructions by both sides, but gave certain instructions, to which the defendant excepted.

The plaintiff moved to instruct the jury as follows:

The court instructs the jury that it was the duty of the defendant to exercise ordinary care—that is to say, such care as reasonable and prudent men use under like circumstances—in supplying and maintaining suitable and safe appliances for the performance of the work required and to furnish a reasonably safe place for the employee to work, and generally to reasonably provide for the safety of the servant in the course of his employment, regard being had to the work and to the difficulties and dangers attending it; and if he neglects so to do, he is liable to the employee for an injury resulting therefrom, as he would be to a stranger.

2.

The court instructs the jury that whilst an employee entering upon a dangerous service assumes the risk incident to the service, the negligence of the master is not one of the risks assumed. This is an exception to the general rule.

3.

The court instructs the jury that the risks assumed by an employee are those reasonably incident to the employment, and no others, unless unusual and unreasonable risks are open and visible and known to and comprehended by the employee.

Opinion.

4.

You are instructed that although you may believe from the evidence that the plaintiff was, at the time he received the injuries complained of, disobeying the orders of his instructions of his superiors in being near the squeezer mentioned in the evidence while said squeezer was in operation, with a ball of iron inside thereof, still if you believe that said injury was occasioned not by any dangerous cause arising from the operation of said squeezer, about which he had been cautioned or advised, but from defect in the construction and operation of the squeezer to which his attention had not been directed by the defendant's superior agents in charge thereof, and which was unknown to plaintiff and was not open and obvious to him, then he was not guilty of such contributory negligence as will bar his recovery.

5.

You are instructed that when the plaintiff entered the service of the defendant company and remained in its service and at work about its machinery, he had a right to presume that the defendant had exercised, and would continue to exercise, due and proper care in providing proper machinery for the conduct of the defendant's business about which he worked, and that defendant would protect him from injury therefrom by reason of latent defects, so far as reasonable human care and foresight could accomplish that result, and that the defendant had discharged his duty in this respect, and that said machinery was reasonably free from defects, and it was not incumbent on plaintiff to inspect and examine said machinery to discover latent defects therein; and if you believe the injury complained of by the plaintiff was occasioned by defect in the said machinery which was not open, patent, and obvious to plaintiff, which he, considering his experience, opportunities, and circumstances, could not reasonably discover by due care and observation, and which was or reasonably could have been

Opinion.

known to defendant, you will find for the plaintiff unless you believe from the evidence that he, knowing of such defect, did some act to bring about the injury complained of, and you are further told that his mere presence at the time of the injury was not such an act as will prevent his recovery.

The defendant moved the court to give the following instructions:

1.

You are instructed that it was the duty of the defendant company to use ordinary care and diligence to provide and maintain for the use of its employees, while in its service, suitable machinery and such appliances as were reasonably calculated to insure their safety while performing that particular service required of them; and if you believe from the evidence that the defendant company did use ordinary care and diligence in the construction and maintenance of that portion of its machinery known as the squeezer and used in connection therewith such appliances as were reasonably safe, then the defendant company discharged its whole duty to the plaintiff in this particular.

You are further instructed that by "ordinary care and diligence" is meant such watchfulness, caution and foresight as, under all the circumstances of the particular case, a corporation, controlled by careful and prudent officers, ought to exercise.

Instruction No. 2.

The court further instructs the jury that the law does not require that the defendant company shall so provide and guard its machinery and appliances as to provide against every possible danger to its servants and employees, but only requires that the defendant company shall use ordinary care in selecting, providing, guarding, and maintaining its machinery and

Opinion.

appliances so that its servants and employees may work thereat with a reasonable degree of safety.

Instruction No. 3.

You are instructed that if you believe from the evidence that the defendant company was in fault and negligent in not having more safeguards about the squeezer to prevent the rod to which the tongs were suspended from coming in contact with the cog or spur wheel, and that by reason of such default and negligence on the part of the defendant company, said rod came in contact with said cog or spur wheel and hurled the rod or tongs against the plaintiff and inflicting on him the injuries in the declaration mentioned, and you further believe from the evidence that it was dangerous to be within less than twenty feet of the squeezer when same was in motion, and a ball of molten iron was therein, or about to be placed therein, and he remained within twenty feet of the squeezer and was injured as aforesaid; and if you further believe that said injury to said plaintiff would not have occurred if he had been more than twenty feet away from the squeezer at the time of the said injury to himself, then said injury was the result of the natural concurring fault and negligence of the plaintiff and defendant, and you must find for the defendant company.

Instruction No. 4.

You are instructed that the defendant company did not insure the safety of the plaintiff while in its employment; its duty to the plaintiff was discharged by the exercise of ordinary care for his safety, and by ordinary care is meant such watchfulness, caution and foresight as, under all the circumstances of the particular service, a careful and prudent man ought to exercise.

You are further instructed that it was the duty of the plaintiff to be reasonably observant of the machinery that he was

Opinion.

required to work near, and inform himself, as far as he reasonably could, respecting the dangers in working near that portion of the defendant company's machinery known as the squeezer, and to observe and obey the orders of a superior under whom he worked, and if you believe from the evidence that the plaintiff did not exercise ordinary care in being at the point where he was when injured, and such want of care on his part contributed to his injury, and that the injury to him would not have occurred but for want of care on his part, then you must find for defendant company.

Instruction No. 5.

The court instructs the jury that it was the duty of the plaintiff to observe and obey the instructions and orders given to him in the conduct of the defendant company, and if you believe from the evidence that the plaintiff wilfully disobeyed and failed to observe the instructions given him by the superintendent, Samuel Duncan, to keep away from the squeezer when it was in motion, and that such disobedience on his part contributed to the injury received by him, and that if he had obeyed said orders and instructions he would not have been injured, then he cannot recover in this action.

Instruction No. 6.

You are instructed, that if you believe from the evidence, that the injury to the plaintiff was the result of an accident which could not, in the exercise of ordinary care, have been foreseen and provided against, and is not attributable to defective machinery or appliances, which defects could not by the exercise of ordinary care and foresight have been foreseen and guarded against by the defendant company, then you must find for the defendant.

Opinion.

Instruction No. 7.

The court instructs the jury that, wherever in the instructions given you it is stated to be the duty of the company to provide "safe appliances for the work to be performed," and to provide generally for the safety of the servant in the course of his employment, it means that it is the duty of the company to provide reasonably safe appliances, and to provide generally for the reasonable safety of the servants.

Instruction No. 8.

You are further instructed that the plaintiff, when he entered the service of the defendant company, took upon himself all the risks incident to the service, and that it was the duty of the plaintiff to use ordinary care for his own safety, and it was also his duty to be reasonably observant of the machinery that he was required to work near, and to inform himself as far as he reasonably could respecting the danger of working near that part of the machinery known as the "squeezer," and it was also the duty of the plaintiff to observe and obey the instructions and orders given him by Samuel Duncan, superintendent, in reference to the work and machinery; and if you believe from the evidence that the plaintiff did not exercise ordinary care and did not obey the orders and instructions of said superintendents, but without ordinary care and in disobedience of said orders and instructions, was near the squeezer at the time said injury was received, and that the want of ordinary care on his part, and his disobedience in being near the squeezer was one of the proximate causes of the injury, and without which said injury would not have been inflicted, then you must find for the defendant.

Instruction No. 9.

The court further instructs the jury that if they believe from the evidence that, on the night the injury was received, the

Opinion.

plaintiff and John English were both at work in defendant's mill—the plaintiff as scale boy, and the said John English as puddle helper—and that they were both on that night working under the control and orders of Michael O'Neal, who was foreman in the puddling department of said mill, then the plaintiff and said English were in law what are known as fellow-servants; and if the jury should believe that the injury was caused by a negligent act of a fellow-servant of the plaintiff, then the plaintiff cannot recover;—in lieu of which the court thereupon instructed the jury as follows:

The court instructs the jury that a servant entering upon a dangerous employment assumes all the ordinary and natural risks usually incident to such employment; but he does not assume extraordinary risks arising from the use of defective machinery, unless the servant has knowledge of the use of such defective machinery, and then after such knowledge chooses to continue in the employment.

No. 2.

The court instructs the jury that it was the duty of the plaintiff to exercise reasonable, ordinary care and prudence for his own safety, and to obey all reasonable instructions given him by his superiors for his own safety, and to be reasonably observant of all open and obvious dangers naturally incident to the service in which he was engaged whilst in the service of the defendant company, and if the jury shall believe from the evidence that the plaintiff disregarded his duty in any or all of the above recited particulars, and that such disregard by the plaintiff of such duty on his part was the immediate and proximate cause of his injury, then he cannot recover.

No. 3.

The court instructs the jury that it was the duty of the defendant company to exercise ordinary care in providing rea-

Opinion.

sonably safe and suitable machinery, appliances and instrumentalities for the use of the plaintiff as their servant whilst in the employment of the defendant company, and to provide generally for the reasonable safety of the plaintiff whilst engaged in the service of the defendant company, and that the plaintiff, in the absence of notice to the contrary, was warranted by law in relying on the fact that the defendant company had performed its duty in so providing for his reasonable safety; and if the jury shall believe from the evidence that the defendant company did not in fact perform its duty to the plaintiff as above stated, and shall further believe from the evidence that the defendant company was guilty of negligence in failing so to do, and shall further believe from the evidence that such negligence on the part of the defendant company was the immediate and proximate cause of the injury to the plaintiff, then they must find for the plaintiff.

After the case had been submitted to the jury, and after they had had the case under consideration for several hours, the jury came into court and stated that they could not agree; thereupon counsel for plaintiff, in open court, in presence of the jury—counsel for defendant being also present—asked the court if he might be permitted to inquire if further instructions might not enable them to arrive at a verdict; and thereupon, without any further discussion, the court sent the jury back to their room; then, in the absence of the jury, the propriety of giving or not giving further instructions to the jury was discussed by counsel. Whereupon, after such discussion, the jury, by order of the court, was brought back into the court-room, and the court then stated to the jury as follows:

“Gentlemen of the jury, go back to your room and continue your deliberation, and if in your judgment you need aid of the court by way of further instruction as to the law of the case, it is your right to ask it.”

And this being all that then occurred, the jury was sent

Opinion.

back to their room to further consider of their verdict, and after a short time returned into court and propounded to the court in writing the following questions, to-wit:

"Can the jury consider the evidence brought out in regard to the man English in the trial of this case?"

"Are servants in any way implied in the context mentioned (from lines 4 to 16, inclusive, of the declaration)?"

"What latitude are we given on these questions?"

The jury was again sent to their room, and, in the absence of the jury, the questions as to what the court's response should be to the queries propounded by the jury were discussed; whereupon the court prepared its response in writing, and the jury was again brought into court, and the court read its instructions to the jury given in response to said queries, which is in the words and figures following, to-wit:

"1st. You are to fully consider all the evidence introduced before you in this case."

"2d. Machinery, appliances and instrumentalities are meant, not servants, except only so far as acts of servants have been offered in evidence to enable you to determine whether there was or was not negligence on the part of the defendant company, as charged in this case."

These instructions given by the court are in substantial accordance with the principles established upon this subject, and there is no error in this action of the circuit court. *Beach on Contributory Neg.*, 42; *So. West. Imp. Co. v. Smith*, 85 Va., 306, and cases cited; *So. West. Imp. Co. v. Andrew*, 86 Va., 270, and cases cited.

There can be no question raised here as to the amount of the damages. If the injury was caused by the negligence of the company, and they are liable to respond in damages at all, the injury was serious, painful, and permanent, and in personal torts and actions generally sounding in damages, it being within the strict province of the jury to estimate the injury, unless there had been manifest abuse, the court will not inter-

Opinion.

fere. *Ward v. White*, 86 Va., 219; *Rixey v. Ward*, 3 Rand., 52; *Daingerfield v. Thompson*, 33 Gratt., 136; *Graham & Waterman on New Trials*, p. 452.

We will consider, then, whether this company is shown to have been guilty of negligence which was the cause of the accident and consequent injury to the defendant in error.

The defendant company was bound to use ordinary care—that is to say, such care as reasonable and prudent men use under like circumstances—in selecting competent servants, and in supplying and maintaining suitable and safe appliances for the work so to be performed, and in providing generally for the safety of the servant in the course of the employment, regard being had to the work and to the difficulties and dangers attending it, for what would be ordinary care in one case may be gross negligence in another. *So. West. Va. Imp. Co. v. Smith*, 85 Va., 306, citing *Beach, Contrib. Neg.*, 22; *Thomp. Neg.*, 982.

It is the duty of the master, so far as he can by the use of ordinary care, to avoid exposing his servants to extraordinary risks, but he is not bound to guarantee them against such risks.

One who employs servants in a complex and dangerous business ought to prescribe rules sufficient for its orderly and safe management. His failure to do so is a personal negligence, for the consequences of which he is liable to his servants. *Riley v. Baxendale*, 6th Hurst & N., 446; *Vare v. Lancashire R. Comp.*, 2d Herbert P. N., 728; *Sher. & Red. Neg.*, 122.

The rolling mill of the plaintiff in error, with its trolley and tongs, its squeezer crushing red masses of molten iron casting off flakes or scales of hot iron, threatening the life and the eyesight of all who worked near it, was an engine of very great danger.

But when we consider the enormous iron cog-wheel, rapidly revolving, into which the iron and tongs were liable to be caught, broken to pieces and hurled about the room or apart-

Opinion.

ment in broken pieces with such force as to be driven through the partition, or to kill any person with whom it came in contact, presents a case of such unusual danger that the company should have been diligent to guard with every means possible against such catastrophies. If this cog-wheel had been encased with a substantial protection, and an obstruction provided to prevent the trolley from rushing over upon it and getting the rod caught, the danger would have been avoided. The company had this subject suggested to it, and had put one band around the front of this cog-wheel, but when it was suggested to it to put a band around the top of this wheel also, neglected to do so.

A skilled workman who happened to be present, and who saw the rod catch in the cog-wheel with disastrous consequences, advised the company to construct an iron band around the top of the said wheel to prevent the recurrence of such accidents, as appears in the photograph exhibited with the record. But the matter was neglected until after the injury in this case, when it was fixed, and now the occurrence of such an accident is impossible.

This presents a case of gross negligence, for which the company is liable. It caused the injury to the defendant in error, and this was the inevitable result of the company's negligence.

There was no contributory negligence on the part of the defendant in error, and he is entitled to recover in this action.

The circuit court having so decided, we are of opinion to affirm the judgment appealed from here.

DECREE AFFIRMED.

NOTE BY REPORTER.—The subject of excessive verdicts in suits for damages for personal injuries is treated in a note to *Standard Oil Co. v. Tierney*, (Ky.), 14 L. R. A., 877, giving a large number of particular verdicts passed upon.

Staunton.

NORFOLK & WESTERN RAILROAD CO. v. WILSON.

SEPTEMBER 12th, 1893.

1. RAILROADS—*License—Duty of company.*—Where the public has been in the habit of crossing the railroad track on foot at a certain place for years without objection from the company,

HELD :

- Such acquiescence amounts to a license and imposes on the company the duty of taking reasonable care to avoid injuring pedestrians.
2. *IDEM—Duty of persons crossing.*—Such pedestrians are bound to take ordinary precautions for their own safety, even if there was any negligence on the company's part.
 3. *IDEM—Injury to persons on the track—Case at bar.*—One crossing railroad at a place where the public is licensed to cross, who knowing that he is on one of the main tracks over which trains pass at all hours, fixes his attention upon a train on the other track which he has changed his course to avoid, and takes no precautions in looking out for trains upon the track on which he is walking, is guilty of such negligence as defeats his recovery for injuries from being struck by such train.

Argued at Wytheville. Decided at Staunton.

Error to judgment of circuit court of Montgomery county, rendered December 6, 1892, in an action of trespass on the case, wherein J. W. Wilson was plaintiff, and the Norfolk and Western railroad company was defendant. The defendant demurred to the evidence, and the jury thereupon conditionally assessed the plaintiff's damages at \$680. The circuit court gave judgment on the demurrer for the plaintiff, to which judgment the company obtained a writ of error from one of the judges of this court. Opinion states the case.

Opinion.

Phlegar & Johnson, for plaintiff in error.

Hoge & Hoge and *Penn & Cocke*, for defendant in error.

LEWIS, P., delivered the opinion of the court.

The plaintiff was struck by a freight train on the defendant's tracks at Christiansburg, and this action was brought to recover damages for the injuries thus inflicted. The company's tracks at this point run east and west, and there are two main tracks—one for east-bound trains, the other for west-bound trains—and there are one or more sidings. The accident occurred about forty or fifty feet east of the depot building, which is on the south side of the tracks.

The plaintiff's account of the matter is, that immediately before the accident he started to cross the tracks, on his way to his boarding-house on the north side of the railroad; that after he had partially crossed, he observed a west-bound train moving on the northern track, and deeming it too near for him to safely cross in front of it, he turned and stepped back on the middle or "east-bound" track; that as he did so he looked west to see if the track was clear, and no train was in sight between him and a certain curve in the road about four hundred yards west of him; that he then walked diagonally across the middle track to the southern ends of the cross-ties, upon which he slowly walked eastward, at the same time "*watching the west-bound train*, and waiting for it to get out of his way"; and that he had taken but a few steps when he was struck by the engine of an east-bound freight train and seriously injured.

He says if the whistle was sounded or the bell rung before he was struck he did not hear it. But two of his own witnesses say the whistle blew "about the depot;" and while a third, who was an eye-witness of the accident, says no signal was given, he is equally positive that the train had rounded

Opinion.

the curve and was in full sight and hearing when the plaintiff turned to cross the middle track.

The evidence for the defendant tended to show that an alarm whistle was sounded about the time the engine reached the west end of the depot, or more than fifty yards from the place of the collision. The train was running twenty-five or thirty miles an hour.

About fifty yards west of the depot is a highway grade crossing, and a rule of the company provides that "the engine bell must be rung for a quarter of a mile before reaching every road crossing at grade, and until it is passed," which rule was not observed in the present case. The plaintiff, however, was not at this crossing, but over a hundred yards east of it.

It appears that for many years before the accident the public had been in the habit of crossing the railroad on foot at the place of the accident without objection by the company; that the spaces between the ties were filled with cinders; and that there was a wide and well-beaten path there. This acquiescence amounted to a license, and imposed upon the company the duty to exercise reasonable or ordinary care to avoid injuring pedestrians crossing at that point. *Va. Midland R. R. Co. v. White's adm'r*, 84 Va., 498; *N. & W. R. R. Co. v. Carper*, 88 *Id.*, 556; *Byrne v. N. Y. Central, &c.*, *R. R. Co.*, 104 N. Y., 362; *Troy v. Cape Fear &c.*, *R. R. Co.*, 99 N. C., 298; 6 Am. St. Rep., 521.

But the plaintiff was, nevertheless, bound to take ordinary precautions for his own safety, and the necessity for his doing so was not relieved by negligence, if there was any, on the part of the company. It was his duty to listen and to keep a constant lookout for approaching trains, to make sure the track was safe. He admits he knew he was on one of the main tracks over which east-bound trains pass at all hours; and had he exercised the vigilance the rule in such a case requires, instead of fixing his attention on the west-bound train after he had changed his course to avoid it, he would not have been

Opinion.

injured. It is unnecessary, therefore, to decide whether or not the company was negligent, for, be that as it may, the negligence of the plaintiff defeats a recovery. *Railroad Co. v. Houston*, 95 U. S., 697; *Marks' adm'r v. Petersburg R. R. Co.*, 88 Va., 1; *Hogan's adm'r v. Tyler, Receiver*, 17 S. E. Rep., 723.

JUDGMENT REVERSED.

Staunton.

JOHNSON v. NORTON LAND AND IMPROVEMENT CO.

SEPTEMBER 12th, 1893.

1. APPELLATE COURT—*Record—Review*.—As the clerk can add nothing to the record, agreed facts copied by him in the record and certified as the facts, whereon the judgment rested, cannot be considered here and the case cannot be reviewed in the absence of a bill of exceptions to the supposed errors of the trial court. *Impr. Co. v. Kain & Hickson*, 80 Va., 592.
2. *IDEM—Depositions*.—Nor is a deposition a part of the record in the absence of a bill of exceptions, though copied in the transcript and certified by the trial court and clerk. *Cunningham v. Mitchell*, 4 Rand., 189.

Error to judgment of circuit court of Wise county, rendered December 12, 1892, in an action wherein the Norton Land and Improvement Company was defendant, and the plaintiff in error, Johnson, was defendant. The object of the suit was to enforce the forfeiture of Johnson's title to a lot in the town of Norton because of a violation of a condition of a deed. The judgment being against Johnson, he brought the case here on writ of error and *supersedeas*. Opinion states the case.

Duncan, Matthews & Maynor, for plaintiff in error.

Burns & Fulton, for defendant in error.

LACY, J., delivered the opinion of the court.

At the trial of this action the facts were agreed, and the forfeiture adjudged by the court. The defendant in the action

Opinion.

thereupon applied for and obtained a writ of error to this court.

There is no bill of exceptions in the case, and no evidence certified in the record, and no motion to set aside the finding of the court (a jury being waived), and no exception taken and certified by the court throughout the proceedings.

There is nothing, therefore, by which this court can review the judgment. The case must be heard and considered in this court upon the errors apparent upon the face of the record. If no exceptions are taken to any supposed errors of the court which tries the case, these acts are not in the record, and cannot appear in the transcript thereof, and the party aggrieved remains as at common law, without relief. 4 Min. Inst., 728, 729. And this applies to the action of the court in refusing to set aside the judgment and grant a new trial, because the same is contrary to the law and the evidence. The evidence cannot be reviewed by the court because it is not in the record and is not made a part of the record by bill of exceptions in any form, and a deposition taken in such case is not a part of the record, although copied in the transcript and certified by the court, and certified by the clerk; it is not the province of the clerk to add anything to the record. *Cunningham v. Mitchell*, 4 Rand., 189; *Bowyer v. Chestnut*, 4 Leigh, 1.

In the case of the *Roanoke Land and Imp. Co. v. Kain & Hickson*, 80 Va., 592, this subject is fully considered and the authorities controlling this question cited and approved. In that case the deposition taken in the case, and certified by the clerk, and affidavits filed in the case, and notices copied and certified by the clerk, were not considered by this court.

This court saying of these, they are not made a part of the record by the court, and it is not the province of the clerk to make anything a part of the record; his province is to copy the record as it is. Citing Judge Green as saying, in *Cunningham v. Mitchell*, *supra*, that "the certificate of the clerk that these papers were the evidence upon which the judgment was

Opinion.

founded, cannot be received as part of the record. His certificate to that effect can have no more effect than that of any other individual. He can certify that such records exist in his office, but not what use was made of them. That ought to have been shown by the record; and it was the duty of the party wishing to avail himself of the fact to have made it a part of the record. Judge Tucker, P., said in *Bowyer v. Chestnut*, *supra*: "The evidence produced upon the trial can only be known by its being spread upon the record by bill of exceptions, or by the certificate of the judge himself. (2 Bac. Abr., 527; 2 Inst., 426.) Unless this is done, the court sees nothing but the process, the pleadings, the verdict, and the judgment (or the judgment when the jury was waived by the parties.) The certificate of counsel affords no evidence of opinion expressed or evidence given, nor the certificate of the clerk of the papers produced before the jury, or the depositions read in the cause.

Mr. Minor says, 4 Min. Inst., 742: "The record proper is nothing but the formal allegations or pleadings on either side, the issue, the impannelling of the jury, the verdict, and the judgment." See also *Magarity v. Shipman*, 82 Va., 806.

There is no question better settled in this court.

It follows that the agreed facts copied in the record by the clerk and certified as the facts upon which the judgment rested cannot be considered here, and that the case cannot be reviewed here. We can, therefore, perceive no errors in record by which the judgment can be reversed. See also *Scott v. Lloyd*, 9 Pet., 418, opinion of Chief Justice Marshall; *Lawrence v. Comm'th*, 86 Va., 579; *Offending v. Ford*, 86 Va., 920; *Fry v. Leslie*, 87 Va., 275.

In the case of *Newberry v. Williams*, cited by counsel as the most recent adjudication upon the subject (89 Va., 298), it was held that as there was no objection to the verdict at the proper time, this failure to object must be considered as a waiver of the exceptions taken during the trial.

Opinion.

In this case there was no exception to the finding and judgment of the court, and for that reason also we are unable to review and correct the judgment, and the same must be affirmed.

DECREE AFFIRMED.

Richmond.

HENINGER v. HENINGER.

NOVEMBER 9th, 1893.

1. **DIVORCE A MENSA ET TORO**—*Case at bar.*—On the facts set forth in this court's statement a decree for a divorce from bed and board and the custody of her children, *held*, properly granted to the wife.
2. **ALIMONY—Rule.**—The general rule is that the husband's income is the fund from which allowance for alimony is allowed.
3. **IDEM—Education of children—Case at bar.**—Where husband's estate consists of unimproved land, the net income of which is not clearly shown, *held*, that a decree which requires the husband to provide for his wife and five infant children a permanent home and \$1,000 a year for alimony and the support and education of the children, will not be affirmed, though the jurisdiction of the court to provide for the education of the children is unquestionable.

Argued at Wytheville. Decided at Richmond.

Appeal from sundry decrees of the circuit court of Tazewell county, the last rendered at the November term, 1892, in a suit for divorce *a mensa et toro* by Catharine V. Heninger against Samuel T. Heninger. The bill charges that while the defendant's treatment of the complainant has at no time during their married life been pleasant or agreeable, he has "of late" treated both her and their children harshly and cruelly; that for some time he has continually quarreled with her, although she has at all times tried to be to him a dutiful and faithful wife, and that he finally resorted to blows; that about two weeks before the commencement of the suit he beat her

with a large stick, inflicting a serious and painful wound, and at the same time struck her violently in the face with his fist; that he subsequently again brutally assaulted her, taking her by the hair of the head, and cursing and abusing her; that he also drew his pistol, and so terrified the complainant and her children that they fled from home and sought shelter and protection at the house of a neighbor, where they have since remained.

The circuit court, after evidence had been taken, granted a divorce, and awarded the care and custody of the children to the complainant: and by several subsequent decrees it made provision for the maintenance of the wife and for the support and education of the children. Other facts are stated in the opinion.

Chapman & Gillespie, for appellant.

Henry & Graham, for appellee.

LEWIS, P., delivered the opinion of the court.

This was a suit for a divorce from bed and board, on the ground of cruelty on the part of the husband, the defendant below and appellant here. The circuit court decreed a divorce, and gave the custody of the five infant children to the wife. It also by a subsequent decree ordered the defendant to provide for them a suitable home, and to pay, for permanent alimony and the support and education of the children, until the further order of the court, a thousand dollars a year, in two equal semi-annual instalments.

The evidence in support of the charges of cruelty is ample and conclusive, and there is no doubt that a divorce and the custody of the children were rightly granted to the wife. The defence set up in the answer that the complainant was persuaded by certain of her relatives hostile to the defendant to

Opinion.

bring the suit merely to harrass him and get possession of his property, and that the charge of cruelty is false—is not only not sustained, but is clearly disproven.

Unfortunately, however, the record, while full enough on these points, does not contain sufficient to enable us to satisfactorily determine what is a proper allowance for permanent alimony and the support and benefit of the children.

The appellant is a farmer and the owner of two tracts of land—one containing 596 acres, the other 2,700 acres—situate in Tazewell, only a comparatively small portion of which is cleared. The residue is unimproved, much of it being “wild mountain land.” The cleared portion, however, is valuable; but what is its value, or what ought to be taken as a fair estimate of the appellant’s income, is not shown with any degree of certainty or precision.

One of the complainant’s most intelligent witnesses, a farmer, who lives in the immediate neighborhood, estimates the annual value of both tracts at \$1,100, from which sum he deducts \$300 for taxes, repairs, etc., leaving \$800 as, in his judgment, the net annual value. Other witnesses put it lower, the estimate of one or more of them not exceeding five or six hundred dollars. It appears that shortly before the commencement of the suit the appellant sold the greater part of his personalty for the purpose, as he says, of paying his debts. The value of the residue does not appear. The commissioner, who was directed to make certain inquiries in the cause, reported, in general terms, that “the property now owned” by the appellant is worth \$30,000; but he says nothing, specifically, as to the income. In 1890, before the suit was commenced, the appellant contracted to sell the land for \$45,000, but the purchaser has refused to take it, and the matters in controversy between them in regard to the sale have not yet been settled. The case has been argued for the appellee largely on the assumption that the appellant is worth \$60,000, and that the annual value of his estate ought to be put at

Opinion.

four per cent on that sum, or \$2,400; but this assumption, whatever the fact may be, is not warranted by the record.

In respect to alimony, the general rule is that the income of the husband, however derived or derivable, is the fund from which the allowance is made. 2 Bish., Mar. & Div. (5th ed.), sec. 447; *Bailey v. Bailey*, 21 Gratt., 43; *Cralle v. Cralle*, 84 Va., 198. In his recent work on Marriage, Divorce and Separation, section 1006, Bishop, in treating of the facts upon which the amount of permanent alimony is determined, amplifies the rule, thus: "In exercising," he says, "the judicial discretion which regulates the amount of the permanent alimony, the judge should take into contemplation the past conduct of the parties, respectively, the source of the husband's property, what persons, if any, each is under a legal duty to support, the earnings and acquiring capabilities of each, the wife's pecuniary means equally with the husband's, the health of each, and their respective ages; and especially, but not exclusively, he should consider what sum, chargeable upon the faculties of the erring husband, will leave the financial condition of the innocent wife not inferior to what it would be if his conduct had been correct." And he adds that as every injury is, in law, entitled to its pecuniary compensation, the wife should have, in addition to the maintenance thus appearing, something for her physical and mental sufferings, and the loss of the husband's society.

So, also, the amount for maintenance of the minor children, when, as in the present case, they are assigned to the wife, depends, not only on their needs, but on the husband's fortune and station in life, and all the circumstances of the particular case. As to this matter, as in the case of alimony, the court, with all the attainable lights before it, must exercise a sound discretion. *Harris v. Harris*, 81 Gratt., 13; *Bailey v. Bailey*, *supra*.

The same considerations apply in regard to the education of the children. This, however, is denied by the appellant, on

Opinion.

the ground that parents are not compellable to educate their children. It is true that while the elementary writers include among the duties of parents to their children that of education, it is a duty of imperfect obligation. Nevertheless, as Blackstone observes, it is a duty pointed out by reason, and of far the greatest importance of any. Chancellor Kent takes the same view, and adds the remark that "a parent who sends his son into the world uneducated does a great injury to mankind, as well as to his own family, for he defrauds the community of a useful citizen, and bequeaths to it a nuisance." 2 Kent, Comm., 195.

It would be strange, then, if the effect of a decree, granting a divorce, and assigning the custody of the infant children to a suitable person, were held to relieve the offending parent of a duty he owes both to his offspring and to society, when he has the means to fulfill it. If this were the effect of the decree, the offender would make advantage of his own wrong, and the interference of the law, intended for the benefit of the children, might work an entirely different result.

The statute, now carried into section 3263 of the Code, authorizes the court granting a divorce to make "such further decree as it shall deem expedient concerning the estate and maintenance of the parties, or either of them, and the care, custody, and maintenance of their minor children"; and while nothing is said in express terms about education, yet the evident purpose of the legislature was to give to the court the largest discretion in respect to the estate of the parties, and not to relieve the offending parent of any duty, moral, social, or otherwise. Under a statute authorizing the court to "make such disposition of and provision for the children as shall appear most expedient," the jurisdiction of the court to provide for their education, in a manner suitable to the parent's means and station in life has been held to be unquestionable; and the language of our statute is little, if any, less comprehensive. 2 Bish., Mar. Div. & Sep., sec. 1214.

Opinion.

For the reasons, however, already stated, the case must be sent back for a further reference to a commissioner in order that the court may be put in possession of all the facts and circumstances essential to an equitable determination of the rights of the parties. Meanwhile the decree of the 9th of December, 1891, making temporary provision for the wife and children, *i. e.*, requiring the appellant, among other things, to pay eighty dollars monthly for their maintenance, will remain in force. And when the case shall have been thus developed, it will be time enough to finally pass upon the question raised here by the appellee as to an additional allowance in the way of counsel fees.

The appellant will pay the costs of this appeal.

AFFIRMED IN PART AND REVERSED IN PART.

Richmond.

WYTHEVILLE INS. & BANKING CO. v. TEIGER.

NOVEMBER 9th, 1893.

Absent, Richardson and Hinton, JJ.

1. **INSURANCE—Delivery—Waiver.**—It is a waiver of the condition of prepayment to deliver a policy without requiring prepayment of premiums.
2. **IDEM—Payment of premiums.**—Where company charges premiums personally to the agent, who gives credit to the insurer, *held*, it amounts to payment.
3. **IDEM—Apparent Agent—Estoppel.**—When insurance company clothes a person with apparent authority to deliver policies and receive premiums, *held*, it is estopped, after policy is delivered to innocent holder, to set up a defence that the agent acted without written authority.
4. **IDEM—Instructions—Payment.**—Plaintiff was insured against loss by fire by defendant, who delivered the policy to brokers who had placed for it many policies, remitting premiums at intervals. They delivered policy to plaintiff's agent without collecting premium. Afterwards, before the loss, plaintiff paid premium to agent, who paid brokers a sum which he testified included the premium, and took receipt "on account of miscellaneous companies." Policy provided that company should not be liable until premium actually paid. The trial court instructed that if the premium was embraced in the sum the agent paid the broker, the jury should find that the premium had been paid; *held*, no error.
5. **DEPOSITIONS—Notice.**—Where defendant had been notified by plaintiff's attorneys in this suit of their intention to take depositions in the State of Georgia in another suit wherein the plaintiff was not interested, on the same day that depositions were taken in this suit in the city of New York, *held*, the defendant's motion to suppress the depositions taken in this suit was properly overruled.

Argued at Wytheville. Decided at Richmond.

Error to judgment of circuit court of Wythe county, rendered at the March term, 1893, in an action of trespass on the case in *assumpsit*, wherein Samuel Tieger was plaintiff, and the Wytheville Insurance and Banking Company, a Virginia corporation, was defendant. The jury found a verdict for the plaintiff for \$798, which the court refused to set aside, and there was judgment accordingly, to which judgment the defendant company obtained a writ of error and *supersedeas* from one of the judges of this court. Opinion states the case.

F. S. Blair, for plaintiff in error.

Walker & Caldwell, for defendant in error.

LEWIS, P., delivered the opinion of the court.

By the policy sued on, the defendant company insured the plaintiff against loss or damage by fire on a stock of goods in New York. The company sent the policy, for delivery and collection of the premium, to Milch, Fleisner & Co., insurance brokers, of that city. This firm had placed many policies of the defendant company, and received the premiums. Their custom, according to the evidence, was to remit to the company "sometimes once a month, sometimes twice a month, and sometimes once in sixty days, depending upon the amount of the premiums collected."

The policy sued on was issued on the 1st of December, 1891, and was delivered to the plaintiff's agent a day or two afterwards, without payment of the premium. This agent was one Adler, an insurance agent, to whom the plaintiff paid the premium, and who, on the 23d of December, 1891, paid to Milch, Fleisner & Co. eighty dollars, for which he took their receipt as follows: "Received from Edward Adler eighty dollars on account miscellaneous companies." The premium on the plaintiff's policy was \$6, which, Adler says, was included in

Opinion.

the payment above mentioned. The goods were destroyed by fire on the 18th of February, 1892. The policy recites that it is issued "subject to the stipulations and conditions of the New York standard form of policy"; and further that "this company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid."

In this state of things the main ground upon which the company denies liability is that the premium was not paid.

Upon the question whether the premium was paid to Milch, Fleisner & Co., the circuit court instructed the jury as follows: "If the jury believe that the sum of \$80 paid by Adler to Milch, Fleisner & Co. on the 23d of December, 1891, embraced the premium on the plaintiff's policy, and that said premium formed part of the said \$80, then the jury will find that the said premium was paid to Milch, Fleisner & Co. on the 23d December, 1891."

Another instruction, given at the instance of the plaintiff, was as follows:

"The court instructs the jury that if they believe from the evidence that the defendant company delivered the policy sued on to Milch, Fleisner & Co., who delivered it to Adler, who delivered it to the plaintiff, and further believe that at no time after the policy was so delivered and before the fire occurred, did the defendant company give the plaintiff notice that it wished to cancel the policy, then they must find for the plaintiff."

The first of these instructions, although both were excepted to, was clearly right. The defendant denied that the payment of eighty dollars to Milch, Fleisner & Co. embraced the premium on the plaintiff's policy, and the question was, therefore, properly submitted to the jury. Nor is there anything in the second instruction to the injury of the defendant, although it may be open to some criticism. Its meaning is clear, and the jury could not have failed to understand it correctly. The evidence on both sides shows that the policy was sent to

Opinion.

Milch, Fleisner & Co. as the defendant's agents; so that if there was an assumption of the fact in the instruction that Milch, Fleisner & Co. were agents of the defendant, it assumed as a fact what the defendant itself had proved.

The case, on the merits, turns upon the effect of the delivery of the policy by Milch, Fleisner & Co.; and upon this point, also, we are of opinion that the case is with the plaintiff.

The firm of Milch, Fleishner & Co. were not only brokers, but, as just said, they were agents of the defendant company. Policies were sent to them directly from the home office, the premiums on which they were authorized to receive, and they were ostensibly authorized to waive a cash payment. Hence, when they delivered the policy in the present case, without requiring payment of the premium, the presumption is a credit was intended, and that was a waiver of the condition of prepayment. If in such a case a waiver were not implied, the delivery of the policy would be not only an unmeaning but a deceptive and fraudulent ceremony. 2 May, Ins. (3d ed.), sec. 360; *Miller v. Life Ins. Co.*, 12 Wall., 285; *Bochen v. Williamsburgh Ins. Co.*, 35 N. Y., 131; *South. Life Ins. Co. v. Booker*, 9 Heisk. (Tenn.), 606, 613; *Farnum v. Phœnix Ins. Co.*, 83 Cal., 246, and cases cited.

Moreover, it is fair to infer from the fact of giving credit in the present case, and the custom of those agents to remit to the company only once or twice a month, and sometimes not oftener than once in two months, that they were in the habit of delivering policies on credit, and that this was known and assented to by the company. *Lebanon Ins. Co. v. Hoover*, 113 Pa. St., 591; *Insurance Co. v. Norton*, 96 U. S., 234.

It would seem, also, from what was brought out in the cross examination of the vice-president of the company, as a witness in the case, although he does not say so in so many words, that the practice of the company was to charge these agents personally with the premiums on policies sent to them. He says

Opinion.

they still owe for a number of policies, some of which have expired. And if they were, in fact, charged with the premium on the plaintiff's policy when the policy was sent, then, as between the plaintiff and the company, the premium was paid when the policy was delivered; for the rule is well settled that where the agent gives credit and the amount is charged to him by the insurer, the transaction is equivalent to payment. *Miller v. Life Ins. Co.*, 12 Wall., 285; *White v. Conn. Ins. Co.*, 120 Mass., 330; *Train v. Holland Ins. Co.*, 62 N. Y., 598; *Bang v. Farmville Ins. Co.*, 1 Hughes, 290.

It is immaterial, therefore, so far as the validity of the policy is concerned, whether the \$80 paid by Adler embraced the plaintiff's premium or not. The policy having been delivered as a valid, executed contract, the only way the company could terminate its liability thereon for non-payment of the premium—if the premium was not paid—was by exercising the reserved right to cancel it, after "giving five days' notice of such cancellation," which was not done. 2 May, Ins. (3d ed.) sec. 360 B.

Complaint, however, is made of the refusal of the circuit court to instruct the jury that if there was no application of any part of the \$80 to the plaintiff's premium at the time of such payment, then that the premium was not discharged; and further, that after the fire occurred, no valid application of any part of the payment could be made for that purpose by any agreement between the plaintiff or Adler and Milch, Fleisner & Co.

This instruction was rightly refused. The latter part of it is not relevant to any evidence in the case; and as to the first part, it is enough to say that it is virtually covered by the first instruction given for the plaintiff. *Ferguson's adm'r v. Wills*, 88 Va., 136. Adler testified emphatically that the payment embraced the plaintiff's premium, and upon that question the jury found against the defendant.

The court was also asked, but rightly refused, to instruct the

Opinion.

jury that if they believed from the evidence that the brokers who delivered the policy were not appointed as agents by the defendant company in conformity with the New York standard form of policy, then it was their duty to have retained the policy until the premium was paid, and that if they failed to pay over the premium to the company before the fire occurred the policy was vitiated.

The New York standard form of policy, subject to the stipulations and conditions on which the policy was issued, provides that "in any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company." But without going more fully into the questions sought to be raised by the instruction, it is enough to say that when an insurance company clothes a person with apparent authority to deliver policies and receive the premiums, as was done in this case, it is estopped, after a policy is delivered as a valid contract to an innocent holder, to set up the defence that the agent acted without written authority from the company. Such a defence, if sustained, would operate as a gross fraud, and can receive no countenance in a court of justice. *Ins. Co. v. Wilkinson*, 13 Wall., 222, 235; *Furnum v. Phoenix Ins. Co.*, 83 Cal., 246, 257; S. C., 23 Pac. Rep., 869; *Ga. Home Ins. Co. v. Kinnier*, 28 Gratt., 88; *Manhattan Fire Ins. Co. v. Weill & Ullman*, *Ibid.* 389, 395.

There are two questions, of less importance, which remain to be considered. The first relates to the overruling of the defendant's motion to suppress certain depositions for the plaintiff, taken in New York on the 14th of December, 1892. The ground of the motion was that the defendant had been notified in another suit of the taking of depositions, in the State of Georgia, on the same day, and that the counsel who gave the notice were the attorneys for the plaintiff in this suit. The latter, however, was in no way interested in, or connected with, the other suit; and, besides, no objection was raised until the calling of the present case for trial, which was several

Opinion.

months after the depositions had been taken. The motion was without merit, and was rightly overruled.

Nor was there error in overruling the defendant's motion for a continuance on the ground of the absence of an alleged material witness. The witness formerly did business at 150 Nassau street, New York, from which place he addressed a letter to the defendant company, dated February 17, 1892. The present suit was commenced in the following August, depositions for the plaintiff were taken in December of the same year, and yet no effort appears to have been made to find the witness, or even to communicate with him, until some time in January, 1893, when the defendant's attorney, being in New York, made, as he says, "diligent search" for him without success. He did not, however, inquire for him at 150 Nassau street, because his former partners said he had gone out of business and that they had not been able to find him. Nor did he attempt, for aught that appears, to communicate with him through the mail, or to find him by looking in the New York city directory. We are of opinion that the record does not show due diligence on the part of the defendant to obtain the testimony of the absent witness. A motion for a continuance is addressed to the sound discretion of the court, and its ruling in the matter will not be reversed by an appellate court unless plainly erroneous.

JUDGMENT AFFIRMED.

NOTE BY REPORTER.—See *Michigan Pipe Co. v. M. F. & M. Ins. Co.*, 20 L. R. A., 277, as to when an insurance agent is to be treated as the agent of the assured.

Richmond.

MACHIR & AL. v. FUNK & ALS.

NOVEMBER 9th, 1893.

1. *WILLS—Powers—Executions.*—Where one to whom a will gives power to appoint to whomsoever he chooses, devises the subject of the power, such devise operates as an execution of the power, unless a contrary intention appears from the will. Code, § 2526.
2. *IDEM—Contingency.*—Where a power is authorized to be executed on a contingent event, it may, unless contrary to the intentions of the party creating it, be executed before (though it cannot take effect until) the contingency happens.
3. *IDEM—Construction—Case at bar.*—E. devised her property equally to P. and C. and to P. as trustee for H. for life, remainder to her issue, and in default of issue, with power to appoint, and in default of appointment, to P. and C.; and provided that if C. died without issue, her share should go to P. and to P. as trustee for H., with power of appointment in H. H. predeceased P. and C. By her will, which made no allusion to the power or its subject, after some specific legacies, H. gave the residue to J., who conveyed it to P. and C. Afterwards C. died without issue, having devised her estate to N.

HELD :

- (1) The will of H., though executed in the lifetime of C., was a valid execution of the power.
- (2) The interest devised by C. to N. in E.'s estate, amounted to one-fourth thereof.
4. *Tax Sale.*—The validity of a sale of land delinquent for non-payment of taxes, which is regular on its face, cannot be assailed collaterally.

Argued at Staunton. Decided at Richmond.

Appeal from decree of circuit court of Shenandoah county, rendered April 6, 1892, in a suit in equity wherein James W.

Statement—Opinion.

Machir and others were plaintiffs and Noah Funk and others were defendants. The principal object of the suit was the sale of certain real estate situate in the counties of Shenandoah and Warren, which had been devised by Elizabeth Machir, deceased, with a view to a division of the proceeds among those entitled thereto. By the decree appealed from, it was, among other things, held that the appellee, Funk, as sole devisee of his deceased wife, Catharine S. Funk, was entitled to one-fourth of the proceeds of the sales of the said real estate, including a lot of something over nine acres, which had been previously sold for taxes, and conveyed by the purchaser to the plaintiffs, appellants here. Other facts are stated in the opinion.

Walton & Walton and E. E. Stickley, for appellants.

John J. Williams and Williams & Bro., for appellees.

LEWIS, P., delivered the opinion of the court.

The case turns largely upon the construction of the will of Elizabeth Machir, deceased, which was admitted to probate in 1848, soon after the death of the testatrix. The second and third clauses of the will are as follows:

“Second. I will and direct that all my estate, real and personal, be equally divided into three parts. One part I give and devise to my son, Philip A. Machir, one to my daughter, Catharine S. Funk, and the other third to my son Philip A. Machir, in trust for the separate use of Harriet Machir, wife of my son, Joseph S. Machir, for and during her natural life, remainder to the children of said Joseph S. Machir and said Harriet and the descendants of any children who may be dead, such descendants taking their parents' shares, and in default of such issue, to such person or persons as the said Harriet by her last will and testament or by deed executed in the presence

Opinion.

of two or more witnesses shall direct. And in default of such deed or will to the said Philip A. Machir and Catharine S. Funk, equally to be divided; each of said shares to be charged with advancements made or to be made either to said Philip A., Catharine S., or Joseph S. Machir, in order to equalize them, or to P. A. Machir in trust as aforesaid.

"Third. In case my daughter, Catharine S. Funk, shall die without children or descendants at her death, her share is to be equally divided between my son, Philip A. Machir, and my said son, P. A. Machir, in trust for said Harriet Machir and children, with power of appointment and limitation over as aforesaid."

Harriet Machir died in 1878, leaving Philip A. Machir and Catharine S. Funk surviving her. She had no child, but left a will whereby she disposed of her whole estate. No reference, however, is made in the will to the power under the will of Elizabeth Machir, nor is the property comprised in it mentioned, and she had considerable property of her own, which, or the most of which, was specifically disposed of. But the will contains a residuary clause as follows: "All the rest and residue of my estate shall be sold after my death by my executors hereinafter named, and after paying all my just debts and the legacies aforesaid, the residue, if any, I give to Mary Ellen Jamison."

By deed of the 9th of February, 1881, Charles W. Jamison and the said Mary Ellen, his wife, conveyed to Philip A. Machir and Catherine S. Funk all the interest and title derived by them, or either of them, under the will of Harriet Machir in and to the estate of Elizabeth Machir, deceased, situate in Shenandoah and Warren counties, in this State, from which source the fund in controversy in the present case arose.

On the 29th of January, 1891, Catherine S. Funk died, she having survived both Harriet and Philip Machir. She died without children or descendants, and by her will devised her whole estate, real and personal, to her husband, Noah Funk.

Opinion.

In this state of things, the first question to be determined is, What is the interest in the estate of Elizabeth Machir, deceased, to which Mrs. Funk was entitled at her death? By the second clause of her will, above quoted, the testatrix directed her estate to be divided into three equal parts. One third she gave to her son, Philip; another third she gave to Mrs. Funk; and the residue she gave in trust for Harriet Machir for life, and in default of issue at her death, then to such person or persons as the said Harriet might by deed or will appoint; and in default of such appointment, to Philip Machir and Mrs. Funk, in equal shares.

The appellants contend that Harriet Machir died without exercising the power of appointment, and that, no child having been born to her, the interest which was devised to Philip Machir, trustee, passed at her death to Philip Machir and Mrs. Funk. The ground of the first branch of this contention is, that inasmuch as the will of Harriet Machir neither refers to the power nor to the property embraced in it, there is nothing to show an intention on her part to execute it. But the common-law rule on this subject, which was recognized in *Blake v. Hawkins*, 98 U. S., 315; *Lee v. Simpson*, 134 *Id.*, 572, 590; and *Hood v. Haden*, 82 Va., 588, has, to a certain extent, been altered by statute in Virginia. That statute, now carried into section 2526 of the Code, enacts that "a devise or bequest shall extend to any real or personal estate (as the case may be) which the testator has power to appoint *as he may think proper*, and to which it would apply if the estate were his own property, and shall operate as an execution of such power, unless a contrary intention shall appear by the will."

Here the testatrix being empowered to appoint the property as she chose (*i. e.*, to whom she chose), the residuary clause in her will operates, by force of the statute, as an execution of the power, a contrary intention not appearing by the will. Under such a statute, where it is not intended to exercise a

Opinion.

general power, the intention to exclude the property should be stated on the face of the will. 1 Sugd., Pow., 368.

This being so, the property, *i. e.*, the subject of the power, passed under the residuary clause of the donee's will to Mrs. Jamison, and afterwards, by the deed of the 9th of February, 1881, to Philip A. Machir and Mrs. Funk, each taking one-half, which was equivalent to *one-sixth* of the estate devised by Elizabeth Machir. We say the property passed to Mrs. Jamison as residuary devisee, because, although the will directs it to sold by the executors, the obvious intention was to confer on the executors a naked power. 1 Lom., Executors, 218; *Mosby's adm'r v. Mosby's adm'r*, 9 Gratt., 584; *Elys v. Wynne*, 22 *Id.*, 224.

As to the interest devised by Elizabeth Machir to Mrs. Funk directly, little need be said. By the third clause of the will it is provided that in the event of Mrs. Funk's death without leaving children or descendants, her share (*i. e.*, the one-third devised by the second clause) is to be equally divided between Philip Machir in his own right and as trustee of Mrs. Harriet Machir and children, with power of appointment on the part of Mrs. Machir in the event specified; that is to say, she (Mrs. Funk) took a defeasible fee simple with a contingent limitation over. She died without issue, whereupon "her share" was equally divided into two parts, one of which passed to the representatives of Philip Machir, according to the doctrine of *Medley v. Medley*, 81 Va., 265, the other under the will of Harriet Machir to her appointee, Mrs. Jamison, whose entire interest in the property, vested and contingent, was conveyed to Philip Machir and Mrs. Funk by the deed of the 9th of February, 1881.

That the power of appointment was well executed by the will of Harriet Machir, although the will was executed and the testatrix died in the lifetime of Mrs. Funk, is unquestionable. This is so in view of the statute, above quoted, and the

Opinion.

established common-law rule that where a power is authorized to be executed on a contingent event, it may, unless contrary to the intention of the party creating it, be executed before (though it cannot take effect until) the contingency happens. 1 Sugd. Pow., 332.

Hence, the interest in the estate of Elizabeth Machir to which Mrs. Funk at her death was entitled was one-sixth *plus* one-twelfth, which is equal to one-fourth, except the nine-acre lot in the proceedings mentioned.

It seems that some time before the commencement of the present suit this lot was sold as delinquent for nonpayment of taxes assessed against Mrs. Funk. It was purchased by one Keister, who subsequently sold and conveyed it to the appellants. The tax sale was duly reported to the county court and confirmed. A survey was also made and reported, as required by the statute, and afterwards a deed was made by the clerk of the county court to the purchaser. The effect of these proceedings, which for aught the record shows were regular, was to divest the title of Mrs. Funk and to transfer it to Keister; and their validity cannot be collaterally assailed. The case of *Hitchcox v. Rawson*, 14 Gratt., 526, is a sufficient authority on this point.

AFFIRMED IN PART AND REVERSED IN PART.

Richmond.

VIRGINIA F. & M. INSURANCE CO. v. MORGAN.

NOVEMBER 9th, 1893.

1. **INSURANCE—Warranties.**—A warranty is an agreement in the nature of a condition precedent, and like that must be strictly complied with, whether material or not. *Ins. Co. v. West*, 76 Va. 575.
2. **IDEM—Conditions—Iron Safe Clause.**—In application for policy of fire insurance insured was asked if he would keep his account books in an iron safe, or secure in another building. He answered in the affirmative.

HELD:

The statement was a warranty.

3. **IDEM—Parol evidence.**—As parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written contract, an insured who could not read English will not be permitted, in the absence of fraud, to prove that his application was filled up by the agent, that he was not questioned as to his books; that he did not tell him he would keep his books in an iron safe or secure in another building, and that the questions and answers were not read to him. *Ins. Co. v. Yates*, 28 Gratt. 585.

Argued at Wytheville. Decided at Richmond.

Error to judgment of circuit court of Tazewell county, rendered at the August term, 1892, in an action on a policy of fire insurance, wherein Samuel Morgan was plaintiff and the Virginia Fire and Marine Insurance Company was defendant. The policy was for \$1,500 on a stock of goods. The jury found a verdict for the plaintiff for \$1,090 90, and there was judgment accordingly, to which judgment the defendant obtained a writ of error and *supersedeas*. Opinion states the case.

Opinion.

Chapman & Gillespie and *W. W. & Bev. T. Crump*, for plaintiff in error.

Henry & Graham, for defendant in error.

LEWIS, P., delivered the opinion of the court.

This was an action on a policy of fire insurance issued by the defendant company on the plaintiff's stock of goods in his storehouse at Cedar Bluff, in Tazewell county. The policy recites that it is based upon the written application, signed by the assured, and that "the said application shall be treated as a part of, and be incorporated in, the policy, and that the statements thereof shall be treated as warranties by the assured that the facts therein stated are true."

In the application the assured was asked the following, among other questions, viz.: "State what books of account you keep; will you keep them in an iron safe or secure in another building?" To which the answer was: "Day-book and ledger; yes."

The goods having been destroyed by fire, the company refused payment, on the ground that the assured had not kept his books in an iron safe or secure in another building, but had kept them in a wooden desk in the storehouse, where they were destroyed in the fire. This defence was also set up in bar of the action under the plea of *non assumpsit*; and at the trial the court was asked in effect to instruct the jury that the answer in the application in regard to the place of keeping the books amounted to a continuing warranty, which, if broken, avoided the policy. But the court refused to so charge, and, on motion of the plaintiff, told the jury in effect that before they could consider the agreement in regard to the books they must believe it was material, and further, that the company was injured by its non-observance.

This ruling was, seemingly, based on the idea that the agree-

Opinion.

ment was not a warranty, but a representation, which is a mistaken view. The stipulation is undoubtedly a warranty, made so by the express contract of the parties, and the jury ought to have been instructed that a literal compliance with it was essential to a recovery by the plaintiff.

“An express warranty,” says May, “is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends. By a warranty the insured stipulates for the absolute truth of the statement made, and the strict compliance with some promised line of conduct, upon penalty of forfeiture of his right to recover in case of loss should the statement prove untrue, or the course of conduct promised be unfulfilled. A warranty is an agreement in the nature of a condition precedent, and, like that, must be strictly complied with.” May, Ins., sec. 156.

This is the language of the decided cases, and of this court in *Lynchburg Fire Ins. Co. v. West*, 76 Va., 575.

And the author correctly adds, that whether the fact stated or the act stipulated for be material to the risk or not, is of no consequence, the contract being that the matter is as represented or shall be as promised; and unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, or the intervention of the law or the act of God, the insured can have no claim. “One of the very objects of the warranty,” he continues, “is to preclude all controversy about the materiality or immateriality of the statement. The only question is, has the warranty been kept? There is no room for construction, no latitude, no equity. If the warranty be a statement of facts, it must be literally true; if a stipulation that a certain act shall or shall not be done, it must be literally performed.”

Whether a statement is a warranty or not depends upon the intention of the parties, as does the nature and effect of the warranty, when there is one, which is to be gathered from the language used and the subject matter to which it relates. Par-

Opinion.

ties have a right to make their own contracts, and when the meaning of the contract is ascertained, effect must be given to it. It is not for the court to add to or detract from it, but the contract must be enforced without regard to any hardship, real or supposed, to either party, or whether it is wise or unwise, provident or improvident.

Thus, in *Jeffries v. Life Ins. Co.*, 22 Wall., 47, where the insured was asked in the application whether he was married or single, and falsely answered that he was single, it was held that the falsity of the answer defeated a recovery, as one of the express conditions of the policy was that the statements in the application were in all respects true; and in the course of the opinion it was said: "There is no place for the argument either that the false statement was not material to the risk, or that it was a positive advantage to the company to be deceived by it. It is the distinct agreement of the parties that the company shall not be deceived to its injury or to its benefit. The right of an individual or a corporation to make an unwise bargain is as complete as that to make a wise one." See, also, *Imperial Fire Ins. Co. v. Coos County*, 151 U. S., 452.

According to the authorities, warranties are of two kinds, viz.: (1) Affirmative, or warranties *in presenti*, as they are sometimes called, which affirm the existence of certain facts pertaining to the risk at the time of the insurance; and (2) Continuing or promissory. An instance of the first class is *Va. Fire & Marine Ins. Co. v. Buck & Newson*, 88 Va., 517. There the insured, in answer to a question in the application, stated that a watchman slept on the premises at night. On the night of the fire the watchman was absent, but it was held that the policy was not thereby avoided, because the answer related to the present, and not to the future—in other words, that the statement was manifestly intended merely as affirmative of the usual and existing state of things, and had nothing promissory as to the future. But, as was said in the same case, a promissory warranty—i. e., one which requires something to be done

Opinion.

or omitted after the insurance takes effect, and during its continuance—avoids the contract, if not complied with according to its terms.

The present case falls within the latter category, certainly as regards the promise to keep the books in an iron safe or secure in another building. It is quite probable, in the nature of the case, that this stipulation was regarded as material; but whether it was or not—for with that we have nothing to do—the contract is express that the books would be thus safely kept; and if, as is admitted, the promise has not been fulfilled, there can be no recovery.

A warranty may be in part affirmative, and in part promissory. Thus, in an Iowa case the building was described as “occupied for stores below, the upper portion to remain unoccupied during the continuance of this policy.” In an action on the policy it was held that so much of the statement as related to the lower portion of the building was an affirmative warranty merely, but that what related to the upper portion was a promissory warranty, which was broken, if, at any time during the life of the policy, that portion of the building was so occupied. *Stout v. City Fire Ins. Co.*, 12 Iowa, 371; 79 Am. Dec., 539.

The main ground upon which the plaintiff relies, in support of the judgment, is a provision in the policy that the same “shall be void if the assured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof;” and further that “this policy is made and accepted subject to the foregoing stipulations and conditions.”

This language, it is contended, is inconsistent with the idea of a warranty, and shows that the answers in the application were intended as representations, none of which would avoid the policy, unless false and material to the risk.

The answer to this is that just as a policy may contain both affirmative and promissory warranties, so it may contain both

Opinion.

warranties and representations; and the present is a case of that sort. In the application, wherein the applicant affirms and warrants his answers to be true, and agrees that the same shall constitute the basis of the insurance, he was asked as to the dimensions of the storehouse, when it was built, &c. Now, as to the answers to these questions and the like, it would be absurd to say that they are anything more than representations, because they are merely descriptive, and were evidently so intended by the parties. *Wood, Fire Ins.*, sec. 138. On the other hand, looking, as we must, to the whole contract, it is equally clear that the answer in regard to safely keeping the books was intended as a warranty. It is not descriptive of anything, and related, not to matters depending upon opinion or judgment, as in *Lynchburg Fire Ins. Co. v. West*, 76 Va., 575, and *National Bank v. Ins. Co.*, 95 U. S., 673, in which cases the assured was asked as to the value of the property, but it constituted an undertaking to do a certain thing in the future, and is, therefore, not within the operation of the provision in the policy just quoted. To call such a stipulation a representation, or anything less than a warranty, is a misuse of terms.

This being so, the only remaining question necessary to be considered arises on a bill of exceptions taken by the plaintiff, defendant in error here. At the trial the plaintiff offered, but was not allowed, to testify that the application, which he admits he signed, was filled up by the agents of the company; that he was not questioned as to his books, and did not tell the agent he would keep them in an iron safe or secure in another building; that, being a foreigner, he could not read the English language; and that the questions and answers were not read to him.

We are of opinion that in this particular the circuit court ruled rightly. There is no pretense of fraud, and to have admitted the evidence would have been an infringement of the rule which excludes parol contemporaneous evidence to con-

Opinion.

tradict or vary the terms of a valid written contract. This, according to *South. Mut. Ins. Co. v. Bates*, 28 Gratt., 585, is so clear that we need only refer to that case. There the insured, in answer to a question, stated that the premises were unincumbered, whereas they were in fact subject to a deed of trust. He was allowed, however, to testify at the trial that he had never read the application, and was not interrogated by the agent of the company as to incumbrances. But on appeal, this court, in an able opinion by Judge Staples, in which the authorities were reviewed, held the evidence inadmissible. The plaintiff, it was said, was bound not only to answer the questions put to him correctly, but to use due diligence to see that the answers were correctly written, and that if he signed the application without reading it, or having it read to him, that of itself was inexcusable negligence. It was also said that if the evidence were admissible, it would be difficult to imagine a case in which the legal import of a deed might not be varied by parol testimony.

The only difference between that case and this is, that here the plaintiff offered to prove his inability to read the language in which the application was filled up. But that is immaterial, for he could have easily ascertained the contents of the paper, and the law presumes, under the circumstances of the present case, that when he signed the paper he understood and assented to all it contained. If the rule were otherwise, there would be no certainty or safety in written contracts.

For the errors, however, in regard to the instructions the judgment must be reversed, and the case remanded for a new trial in conformity with this opinion.

JUDGMENT REVERSED.

Richmond.

WESTERN UNION TEL. Co. v. TYLER.

NOVEMBER 16th, 1893.

TELEGRAPH COMPANIES—*Penalties—Inter-State Commerce.*—Code, § 1292, providing that every telegraph company shall deliver a telegram promptly to the person to whom it is addressed, and that for every failure to forward or deliver same as promptly as possible, the company shall forfeit \$100 to the person sending it, or to the person to whom it is addressed, *held*, not a burden upon, or a regulation of, commerce, and not in conflict with any act of Congress, or with the inter-state commerce clause of the United States Constitution; and the action to enforce the forfeiture need not be in the name of the commonwealth.

Error to judgment of circuit court of Alleghany county, rendered March 29, 1892, in an action of debt for a penalty, wherein J. O. Tyler was plaintiff and the Western Union Telegraph Company was defendant. There was a verdict and judgment for the plaintiff, to which judgment the defendant company obtained a writ of error from one of the judges of this court.

Stiles & Holladay, for plaintiff in error.

Benj. Haden, for defendant in error.

LEWIS, P. delivered the opinion of the court.

This was an action against the Western Union Telegraph Company, to recover a statutory penalty of one hundred dollars for the failure of the company to deliver as promptly as

Opinion.

practicable a certain dispatch sent from Ashville, North Carolina, to the plaintiff, at Clifton Forge in this State. Section 1292 of the Code, under which the action was brought, reads as follows:

“It shall be the duty of every telegraph or telephone company, upon the arrival of a dispatch at the point to which it is to be transmitted by said company, to deliver it promptly to the person to whom it is addressed, where the regulations of the company require such delivery, or to forward it promptly as directed, when the same is to be forwarded. For every failure to deliver or forward a dispatch as promptly as practicable, the company shall forfeit one hundred dollars to the person sending the dispatch, or to the person to whom it was addressed.”

It is admitted that the dispatch in question was not delivered as promptly as practicable, but the company, nevertheless, denies the plaintiff's right to recover, on two grounds, viz: (1) Because the action, if maintainable at all, ought to have been in the name of the commonwealth; and (2) because section 1292 of the Code is repugnant to that clause of the constitution of the United States which gives to Congress the power to regulate commerce among the several states.

As to the first point, little need be said. Section 712 of the Code provides that “where any statute imposes a fine, unless it be otherwise expressly provided, or would be inconsistent with the manifest intention of the general assembly, it shall be to the commonwealth,” etc.; and by section 745 it is provided that “wherever the word ‘fine’ is used in this chapter it shall be construed to include a pecuniary forfeiture, penalty, and amercement.” But these sections, upon which the company relies, have no application to a case like the present. Section 1292, which gives a right of action in a case of this sort, expressly provides that the forfeiture shall be “to the person sending the dispatch, or to the person to whom it was addressed;” and it would, therefore, be manifestly inconsistent

Opinion.

with the intention of the legislature to hold that the commonwealth has any interest in the penalty sought to be recovered in the present case, or that the action is not properly in the name of the plaintiff.

The next question, then, is whether section 1292, so far as it relates to a case like the present, is unconstitutional.

That the power of Congress to regulate commerce among the States is unlimited and supreme, is not disputed. It was so decided in the great case of *Gibbons v. Ogden*, 9 Wheat, 1, and the subsequent decisions to the same effect are very numerous. It must also be conceded that telegraphic communication, like the transportation of passengers and merchandise, is commerce, and that such communication, when had between different States, is inter-state commerce. In *Telegraph Co. v. Texas*, 105 U. S., 460, it was distinctly decided that a telegraph company occupies the same relation to commerce as a carrier of messages that a railroad company does as a carrier of goods; that both companies are instruments of commerce; and that their business is commerce itself. See, also, *W. U. Tel. Co. v. Pendleton*, 122 U. S., 347; *Leloup v. Port of Mobile*, 127 *Id.*, 640. Nor is it denied that those subjects of commerce which are national in their nature, admitting of only one uniform system or plan of regulation, such as the transportation of commodities, or the transmission of messages, between different States, is subject to the exclusive control of Congress, and, consequently, that any regulation thereof by State legislation, whether Congress has legislated on the subject or not, is void. *Cooley v. Board of Port Wardens*, 12 How., 299; *Welton v. State of Missouri*, 91 U. S., 275; *Henderson v. Mayor, &c.*, 92 *Id.*, 259; *Gloucester Ferry Co. v. Pennsylvania*, 114 *Id.*, 196; *Robbins v. Shelby Taxing District*, 120 *Id.*, 489; *Leisy v. Hardin*, 135 *Id.*, 100; *Lehigh Valley Railroad v. Pennsylvania*, 145 *Id.*, 192; *W. U. Tel. Co. v. Texas*, 105 *Id.*, 460; *Leloup v. Port of Mobile*, 127 *Id.*, 640.

These principles were acted on by this court in *N. & W. R. R.*

Opinion.

Co. v. Commonwealth, 88 Va., 95, and we do not understand them to be controverted in the present case.

But does the statute, the validity of which is here drawn in question, amount to a regulation of commerce? In *Western Union Tel. Co. v. Pendleton*, 122 U. S. 347, a statute of Indiana was held to be repugnant to the commerce clause of the constitution, so far as it attempted to regulate the delivery of dispatches sent from that State into other States, because, as the court said, conflicting legislation would inevitably follow with reference to telegraphic communications between different States, if each State was vested with power to control them beyond its own limits.

But that is not the question in the present case, nor does the reasoning in that case apply to this. This is an action for the failure to deliver in this State a dispatch sent from another State and deliverable here, under a statute of this State. There is no question as to the extra territorial operation of the statute, and it will be time enough to decide that question when it arises.

It has been argued with great earnestness that the statute amounts to a regulation of inter-state commerce, but we are unable to come to that conclusion. If it can be said to affect commerce at all, it does so only remotely or incidentally. It prescribes no new rule, and imposes no additional duty, and so far as the delivery of telegrams is concerned, it simply prescribes a penalty for a failure to deliver where the regulations of the company itself require such delivery. That it would be competent, moreover, for the State to afford redress through her courts, according to the common law, for the negligent failure of a telegraph company to deliver a dispatch sent from another State, is unquestionable, and if this may be done, it is equally competent for the State to seek by legislation in advance to prevent such violation of duty.

We think the case is within the principle of the decision in *Sherlock v. Alling*, 93 U. S., 99, namely, that "the legislation

Opinion.

of a State, not directed against commerce or any of its regulations, but relating to *the rights, duties, and liabilities of citizens, and only indirectly and remotely affecting the operations of commerce*, is of obligatory force upon citizens within its territorial jurisdiction, whether on land or water, or engaged in commerce, foreign or inter-state, or in any other pursuit."

This principle was applied and amplified in *Smith v. Alabama*, 124 U. S., 465, and again in *Nashville, &c., Ry. Co. v. Alabama*, 128 *Id.*, 96.

In the *Smith* case the question was whether a statute of Alabama, making it unlawful for any locomotive engineer to drive or operate any train of cars without having been first examined and licensed, was in contravention of the commercial power of Congress, so far as it applied to engineers employed on inter-state trains; and it was held that it was not. After a full consideration of the case the conclusions announced were (1) that the statute was not in its nature a regulation of commerce; (2) that it was properly an act of legislation within the reserved power of the State to regulate the relative rights and duties of persons within the State, so as to secure safety of persons and property; and (3) that so far as it affected inter-state commerce, it did so only indirectly, and not so as to burden or impede such commerce.

In the course of the opinion it was said, by way of illustration, that a common carrier, although engaged in inter-state commerce, is liable, according to the local laws of the particular State in which he may be guilty of any nonfeasance or misfeasance, as, for example, for *his failure to deliver goods at the proper time and place*, or for injuries to passengers caused by his negligence, and that in neither case would it be a defence that the law giving the right of redress was void as being an unconstitutional regulation of commerce by the State.

These views were repeated in the case in 128 U. S., above cited, where a statute of Alabama, requiring the examination of certain railway employees with respect to their powers of

Opinion.

vision, was sustained, and held not to be a regulation of commerce. The provisions of the statute, like those of the statute upheld in the Smith case, were held to be but parts of that local law which governs the relation between carriers of passengers and merchandise and the public who employ them, which, as respects inter-state commerce, are not displaced until they come in conflict with an express enactment of Congress. And after quoting from the opinion in the Smith case, it was added that what the State may punish or afford redress for, when done, it may seek by proper precautions in advance to prevent.

In *Sherlock v. Alling*, *supra*, the main point was whether a state statute giving a right of action to the personal representative of a deceased person, whose death is caused by the wrongful act or omission of another, could be constitutionally applied to the case of a loss of life by a collision between steamboats navigating the Ohio river engaged in inter-state commerce. The defendant's contention was that the statute enlarged the liability of parties for such torts, and, if applied to marine torts, would constitute a new burden on commerce. But this view was rejected, and the statute was held a valid addition to and amendment of the general law of the State, which did not, within the meaning of the Constitution, place a burden on commerce, or amount to a regulation thereof. And referring to previous decisions, relied on by the defendant, it was said that the legislation adjudged invalid in those cases "created in the way of tax, license or condition, a direct burden on commerce, or in some way directly interfered with its freedom."

Tested by these principles, section 1292 of the Code is not open to the objection that has been urged against it. It is not, in a legal sense, a burden upon or a regulation of commerce, nor does it conflict with any act of Congress. It is simply, as was the legislation involved in the cases just mentioned, an amendment or enlargement of the local law, which is subject

Opinion.

to modification by the legislature, and which regulates the relative rights and duties of telegraph companies and persons doing business with them in this State. It is, of course, competent for Congress, in the exercise of its plenary power in the matter, to prescribe specific regulations touching foreign or inter-state commerce, which regulations would supersede all conflicting local law which even indirectly affects such commerce. But until some such action is taken by Congress we are obliged to hold that section 1292 is a valid enactment.

The following extract from the opinion in *Smith v. Alabama*, is, *mutatis mutandis*, no less applicable to this case than to that. There it was said:

“But for the provisions on the subject found in the local law of each State, there would be no legal obligation on the part of the carrier, whether *ex contractu* or *ex delicto*, to those who employ him; or if the local law is held not to apply where the carrier is engaged in foreign or inter-state commerce, then, in the absence of laws passed by Congress or presumed to be adopted by it, there can be no rule of decision based upon rights and duties supposed to grow out of the relation of such carriers to the public or to individuals. In other words, if the law of the particular State does not govern that relation, and prescribe the rights and duties which it implies, then there is and can be no law that does until Congress expressly supplies it, or is held by implication to have supplied it, in cases within its jurisdiction over foreign and inter-state commerce. The failure of Congress to legislate can be construed only as an intention not to disturb what already exists, and is the mode by which it adopts, for cases within the scope of its power, the rule of the State law, which until displaced, covers the subject.”

The result of these views is that the judgment complained of must be affirmed.

JUDGMENT AFFIRMED.

Richmond.

RICHMOND & DANVILLE RAILROAD CO. v. DUDLEY.

NOVEMBER 16th, 1893.

1. **EMPLOYEES—Injuries—Contributory negligence—Disobedience.**—Where, contrary to rules, conductor allowed cars to be shifted and run down grade without an engine to control them, and whilst he was between the cars, a brakeman, without objection from the conductor, caused another car to run down the same way, which, by reason of defective brakes, could not be controlled, and struck the first-named cars with such violence that the conductor was injured,

HELD :

The conductor cannot recover on account of his own negligence and disobedience of the rules.

2. **IDEM—Presumption.**—Railroad companies are entitled to presume that cars delivered to them by connecting companies are in proper condition.
3. **IDEM—Failure to inspect.**—Conductors who are required by the rules to inspect all cars picked up in transit, cannot recover for injuries received by them by reason of their failure to inspect such cars.

Error to judgment of circuit court of Culpeper county, rendered March 25, 1892, in an action of trespass on the case, wherein David Dudley, the defendant in error, was plaintiff, and the Richmond and Danville Railroad Company, the plaintiff in error, was defendant. Opinion states the case.

Wm. H. Payne and *J. C. Gibson*, for plaintiff in error.

F. L. Smith and *Edmund Burke*, for defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

Opinion.

A transcript of the record, including a certificate of all the evidence adduced before the jury at the trial, is exhibited. After the evidence was all in, a multitude of instructions were presented upon both sides, some of which were granted to plaintiff and defendant, and some were refused to both. The jury rendered a verdict for the sum of \$9,000 damages against the defendant, which verdict the defendant moved the court to set aside, because the verdict was contrary to the law and evidence; because of misdirection by the court; because the verdict was excessive; and because of misconduct on the part of the jury; which said motions the court overruled, and entered judgment upon the verdict. A demurrer to the declaration, the court had likewise overruled.

It appears from the record, that on the 12th of December, 1889, the plaintiff below—defendant in error here—a freight conductor in the employment of the defendant company, was conducting a freight train from Charlottesville to Alexandria. At Culpeper, an intermediate station, he received a telegraphic order to shift certain stock cars then in and upon a side-track of the defendant's road, north of its station at Culpeper to another side-track of the defendant south of its station at Culpeper, and also to take into his train a certain car loaded with spokes, which was in and upon the side-track north of Culpeper. The conductor, Dudley, who received this order, directed his men—including a brakeman named Munday—to go and shift the cars; and he addressed himself to the undertaking of the removal of a car which obstructed the street in the town of Culpeper. The men whom he had ordered and sent to shift the cars attempted to effect the shifting by dropping them down the track without the grasp or control of an engine; and his attention was called to the fact that two of the cars so dropped down the track were running down the grade without any one upon them—running "wild," in railroad parlance. The conductor, Dudley, pursued, overtook and stopped these cars, and was in between them, endeavoring to get a

Opinion.

coupling pin out of the drawhead of one of them, when Munday, whom he had sent to do the shifting, removed the wooden chock from under the car loaded with spokes, as it stood at the head of the grade, where it had been left when pushed out of the siding, and put his shoulder to start it, when it went down the grade, gathering momentum so rapidly that it got beyond the control of the brake, and ran with great velocity and violence against the cars which Dudley had stopped, and caught and mashed and severely hurt him between the cars, where he had placed himself in the endeavor to extricate the coupling pin as aforesaid; whereupon he exclaimed: "My God! Munday, you have killed me; how often have I told you about this before?"

Dudley was an old conductor with twenty years' experience in railroad service. He was engaged at the time of his injury in his regular and appointed work, which he was paid to perform. By the rules of the company, which were placed in his hands in the form of a regular book, and by special orders constantly repeated, he was instructed, generally and particularly, as to his duties. He represented the company, commanded the crew and the train, and was responsible for the protection of the company's property. By the rules of the company, as well as exnecessitate, a train, once launched upon its career, must be under the absolute control of one person, whom all connected with the conduct of the train are in duty bound to obey. The law requires and approves this order and discipline. See *R. & A. R. R. v. Moon*, 78 Va. (Hansbrough), 745-750; *R. & A. R. R. v. Johnson*, 84 Va. (Hansbrough), 713; *Railroad v. Williams*, 86 Va. (Hansbrough), 176; *Railroad v. Ayers*, 84 Va. (Hansbrough), 679; *Railroad v. Rudd*, 86 Va. (Hansbrough), 648.

Proper rules must be made, and the conductor must obey and enforce them. *Donnelly v. N. & W. R. R.*, 84 Va. (Hansbrough), 858.

Dudley was injured sixty miles from a terminal point, while

Opinion.

its train was out upon its run, and where he was in absolute command. The order which set the cars in motion, down grade, without the control and grasp of an engine, in gross violation of the express and especial rules of the company, and which injured him, was given by him to Munday, whom he knew and declared to be an open, reckless, and frequent violator of that particular rule, "Z," which explicitly forbids the attempt to shift cars without the connection and control of an engine, yet whose disobedience and reckless violation of the rules of the company he never reported. He turned his train and his own special duty over to his reckless subordinate, absented himself from the operation and direction of the shifting, and observed nothing till he sees the car flying wildly down the grade of the track and hears the shout, "Look out! there goes a car down the main track without brakes on it." He pursues this car, leaps upon it, and rides it down to its destination. He knew that it was moving in gross violation of the general orders and express rule of the company, yet with this disobedience of orders by his subordinate under his eyes; with the general and special rules of the company in his pocket, he did not give even a hint of disapproval of any sort of the dangerous disobedience and misconduct of his subordinates, until he is injured by it, between the cars, where he had placed himself in violation of the rules of the company made to protect him and the property of the company from injury, and which common experience and prudence advised him was a most perilous position. While in this perilous position, his disobedient subordinates, encouraged by the approval of his silence, launched car after car, four in all, down grade, in defiance of Rule "Z," without even a forbidding word or waive of the hand from him, until one, heavily loaded, goes wildly down the descending grade, acquiring too much momentum to be controlled by its brake, which Munday applied to it, and plunges against the cars which he had stopped and between which he had placed himself, when he, instinctively,

Opinion.

recognized the cause of his injury by the exclamation, "My God, Munday, you have killed me! How often have I told or warned you of this before!" It is clear that if Dudley had been at his proper post of duty and enforcing obedience to the express and imperative rule of the company as to the only allowable and safe mode of shifting cars, he would not have been hurt. It is clear that if Rule "Z," so often, so imperatively, and so constantly repeated, had been observed, he would not have been injured. If he had even used reasonable prudence in keeping from between the wild-cat cars, or had simply signalled a forbidding disapproval of what was going on in violation of rules which it was his special, peculiar, and paramount duty to enforce, he would not have been injured. The company had ordered this conductor into no perilous duty; there was absolutely no danger in shifting cars if Rule "Z" had been observed; and the company had taken every precaution to impress Rule "Z" upon the men, and it was present only in the person of the conductor, who defied and disobeyed its rule, and who had promised to prevent the very disaster which was caused primarily and proximately by his disobedience and gross negligence.

It is claimed that the brake upon the car loaded with spokes was defective, and that this caused the injury. But the answer to this is, that the rules of the company made it the express duty of the conductor to see to the careful inspection of all cars which he should put into his train in the transit, and that this duty he did not perform. It was put into his train without inspection, report or information of any defect whatever; it was carried to Manassas and thence to its destination. It was a Pennsylvania car, which had brought freight to, and carried freight from Culpeper without any discovered or known defect. The railroad companies in handling the vast mass of commerce which burdens their roads, have a right to presume that cars delivered to them by connecting lines of great railways are in proper condition. McKinney on Fellow Servants,

Opinion.

sec. 26; Patterson on Railway Accidents, sec. 241; 21 Amer. and English Rep., 561, 564; 15 Amer. and Eng. Rep., 196.

It is not required that railroad companies shall have inspection shops and special inspectors all along the line of their roads. It is apparent that they are largely dependent upon their conductors, into whose hands their trains are committed, whose duty it is to inspect any cars which they pick up and incorporate into their trains in the transit. This it does appear was not done by Dudley or his subordinates *en route*. But Dudley himself not only did not know anything about the defective brake, but he is quite clear and certain, that in spite of the numerous warnings that he had given to Munday "about this thing before," but which he had practically concealed from his employees, Munday caused the accident and not a defective brake. Munday himself, who used the brake, knew nothing of any defect, nor did Deland, the engineer. Thornbury, an exceedingly swift and self-contradicted witness, testified that he shouted to Munday "not to start that car, it has no brake on it." In the next sentence he says, "Munday let off the brake," which he had just sworn was not there; and after the car had got far down the hill and was running rapidly he says he called to Munday, "not to let it get the start of him, the brake is not in order." When examined as to how he knew about the brake, he said he examined it *after the accident*, and "had no opportunity to examine it before." And when confronted with his testimony on a former trial, as to the brake, he admits that "he does not know what was the matter with it."

But, even if it were conclusively proved that the brake was defective, the conductor, who was injured by its being set in motion by his own negligence and disobedience of the rules of the company, cannot recover. The promoting and the dominating cause of the injury in the case, which controlled every subsequent event, was the turning of the cars loose upon the track and ordering the shifting to be done without an

Opinion.

engine, in violation of rule "Z" of the company, and the failure to inspect before incorporating the car in the train. See McKinney on Fellow Servants, sec. 31, George's case, 88 Va. (Hansbrough) 223.

The foregoing review of the evidence, bringing us to the conclusion that the appellee, Dudley, was the victim of his own gross negligence and disobedience of the rules of the company, and cannot recover damages for his own wrong, renders it wholly unnecessary to advert to the errors assigned as to the instructions given and refused by the court. We are of opinion that the verdict of the jury and the judgment of the circuit court of Culpeper are wholly erroneous; and our judgment is to reverse and annul them.

JUDGMENT REVERSED.

Richmond.

OSBURN v. THROCKMORTON.

NOVEMBER 16th, 1893.

MARRIED WOMEN—*Separate estate—Transfer—Case at bar.*—A debt secured by trust deed on land, became, under the creditor's will, the separate property of a married woman, with whose knowledge and consent it was settled with her husband in the purchase of land that was conveyed to her and yet remains hers. Subsequently the bond of matrimony between them was annulled, but the rights of property were left by the decree as they stood at its date. Afterwards she claimed the debt as her property and as unpaid, alleging her ignorance of her rights under act of April 4, 1877, at the time of the settlement. By her direction the trustee advertised the land for sale under the trust deed. The debtor obtained an injunction to the sale.

Held:

1. Under that act a married woman may give her separate estate to her husband, and her ignorance of the law does not invalidate the transaction.
2. The rights of property between them became *res judicata* by the decree of divorce.
3. The injunction was rightly perpetuated, as the debt has been paid, and the grantor in the trust deed is entitled to have it released.

Appeal from decree of circuit court of Loudoun county, rendered October 22, 1891, in a chancery suit wherein James B. Throckmorton was complainant and Townsend M. Osburn, trustee, and Annie E. Throckmorton were defendants. The decree being adverse to the defendants, they appealed. Opinion states the case.

John M. Orr, for appellant.

Ed. Nichols and Alexander & Tibbs, for appellee.

LACY, J., delivered the opinion of the court.

This is an appeal from two decrees of the circuit court of Loudoun county, rendered respectively at the January term, 1891, and the October term, 1891. The bill was filed in this case in December, 1890, to enjoin Osburn, trustee, from selling a tract of land in Loudoun county, conveyed to him as trustee by deed dated March 8, 1876, executed by James B. Throckmorton and Eliza J. Throckmorton, his wife, to secure the payment to Joseph Lodge of the debt therein mentioned of \$2,000, due by note executed by the said James B. Throckmorton, dated March 8, 1876. The ground stated in the bill upon which the injunction is sought is as follows: The said Joseph Lodge died in the year 1877, after having made his will, by which said Osburn, trustee, was appointed the executor of the same. That during the first year of said executor's administration of said estate the said \$2,000 was fully settled, and was charged in his executorial account as settled and collected, and the account confirmed more than ten years before, and the said bond evidencing said debt was surrendered to the debtor as paid. But the trust deed executed to secure the same by inadvertence was not released, though discharged in fact, and no trust remained to be executed by said trustee. That, nevertheless, the said Osburn, trustee, had advertised the said land for sale, as was shown by copy of advertisement exhibited with the bill, reciting in the said advertisement that the said debt secured by the said deed was now the property of the appellant, Annie E. Throckmorton, under the provisions of the said Lodge's will, of which he is the executor. The complainant averred that the will of Lodge contained no such provision, and that, being the executor of the Lodge will, Osburn, trustee, was disqualified from acting as trustee under the deed. The injunction was awarded by the judge of the

Opinion.

Loudoun county circuit court in accordance with the prayer of the bill in December, 1890. At the January term, 1891, of the said court, the defendant, Osburn, trustee, demurred to the bill for want of equity, and for want of Mrs. Annie E. Throckmorton as a party, she being a proper party, and answered: That he admitted that the debt was due by James B. Throckmorton and note given and secured by trust deed, as stated in the bill, conveying the said tract of land to him as trustee. That Lodge made his will, and appointed him executor thereof, etc., and died, as charged in the bill; but denied that the said debt had been paid, and the bond delivered as settled to the debtor, stating that he, as trustee, had been required by Annie E. Throckmorton, the owner of the debt secured under the said deed, to execute the same by the sale of the said land. That it is true that the will of Lodge did not mention the said debt, and provide that it should be paid to Annie E. Throckmorton, but that it became her property under the said will, her mother, Mary A. Humphrey, being entitled to a portion of his estate under the will; and that she had died and left three children—to wit, Abner Edward Humphrey, Virginia, wife of Volney Osburn, and said Annie, then the wife of Mason Throckmorton, son of said James B. Throckmorton, the complainant; and that said Annie E. was entitled to one-third of the said legacy to her mother, which, under the laws of Virginia, in July, 1877, was her separate property. That under the distribution of the estate this bond in question was allotted to the children of Mary C. Humphrey, and was then allotted to Annie E., and received by her husband, Mason Throckmorton, and taken into his possession, and his (Osburn's) connection with the said bond as executor, ceased when he assented to this legacy, and he had no further concern with it, and was, therefore, not disqualified by reason of his being executor from acting as trustee to execute the said trust; and moved the dissolution of the injunction awarded in the case. A decree in the said court, rendered on the 22d

Opinion.

day of October, 1890, in a cause in the said court between Mason Throckmorton and his wife, whereby a divorce *a vinculo matrimonii* was granted the husband against the said Annie, his wife, was exhibited with the said answer; and at the January term, 1891, a decree was rendered in the said cause, whereby the demurrer to the bill was overruled, and on his motion leave was given the plaintiff, James B. Throckmorton, to amend his bill, making Annie E. Throckmorton a party defendant thereto, which was filed accordingly; and it was set forth by way of amendment that the whole of the said \$2,000 bond did not pass to said Annie as her share, but that \$827 05 was in excess of her share, and was due to the said Abner Edward, and he paid this to him by a new bond for that amount, with security, which was accepted by said Abner, and surrendered on his part. The residue belonged to Annie. The bill then states how, in detail, the debt was paid to Mason, about which Annie was consulted with reference to the payment of the said debt to her husband by a conveyance to him of property and land, and that the said settlement made December 25, 1878, was with her knowledge, and had her approval and consent, and he (the complainant) had never heard from her a word of dissent or disapproval until about the time the land was advertised for sale. That up to 1885 the relations of Mason and Annie to each other as husband and wife were such as are usual between husband and wife. That in 1878 Mason bought a tract of land worth \$1,600, and had the deed made to his said wife, without her knowledge until he informed her, which is still hers; and he gave her large sums, stated in the bill, exceeding, with the said land, the amount received in the said Lodge debt by her husband. In 1880 Mason and Annie were divorced, and Annie required to pay the costs. That there had been a complete settlement between him and Mason, with which Annie had remained satisfied until the disagreement between her and her husband. Annie answered, and made general denials of consent on her

Opinion.

part to the delivery to her husband of her property in question, and emphasizes her ignorance of her rights under the act of 4th of April, 1877, known as the "Married Woman's Act," and that the said act made this property her separate estate. But in the evidence it is shown that she knew all about it, and was a party to its delivery to her husband, and to the purchase of the Throckmorton place, subject to liens on it belonging to her husband's mother. And in her deposition she admits that she knew that it was handed to her husband, and on cross-examination that she gave her consent to its investment in the farm, and that she was present at the division of the Lodge estate and delivery of the J. B. Throckmorton note to her husband. In the suit of *Throckmorton v. Throckmorton*, referred to above, and decided in this court April 10, 1890, which was a suit between the said Mason and Annie, his wife, for divorce *a vinculo matrimonii*, and reported in 86 Va., 768, the said Annie asserted her claims against her husband for large sums of money belonging to her, amounting to \$10,000, which he had received for her, and which sums included the debt in question here, as she says in her deposition in this case. In that suit her claim was decided against her, and her husband was divorced at her costs.

The first question we are to consider is the effect of this transfer of her rights by the married woman to her husband, and consenting to its investment in a particular manner, or to its use by him. Can the transaction be avoided upon the ground that she was ignorant of the law affecting the subject? If upon the mere ground of ignorance of the law men were admitted to overhaul or extinguish their most solemn contracts, and especially those which have been executed by a complete performance, there would be much embarrassing litigation in all judicial tribunals, and no small danger of injustice from the nature and difficulty of the proper proofs. *Lyon v. Richmond*, 2 John. Ch., 51, 60; *Shotwell v. Murray*, 1 Johns. Ch., 512; *Storrs v. Barker*, 6 Johns. Ch., 169, 170; Story, Eq. Jur.,

Opinion.

§ 111. The presumption is that every person is acquainted with his own rights, provided he has had a reasonable opportunity to know them; and nothing can be more liable to abuse than to permit a person to reclaim his property upon the mere pretense that at the time of parting with it he was ignorant of the law, acting on his title. *Proctor v. Thrall*, 22 Vt., 262. Ignorance of the law does not affect agreements in courts of equity, nor excuse from the legal consequences of particular acts. 1 Fombl. Eq., c. 2, § 7, note 2; 1 Madd. Ch. Pr., 60; *Hunt v. Rousmaniere*, 1 Pet., 1, 15, 16; 1 Story Eq. Jur., §§ 112, 113, 115, 116. A married woman possessed of separate property, as to which she has a general right of disposal, may bestow it upon her husband as well as upon a stranger, and courts of equity will sanction such disposition when made by the wife. Story, Eq. Jr., §§ 1395-1397. And, as was said by this court in *Beecher v. Wilson*, 84 Va., 813, the married woman's act of April 4, 1877, does not prevent a wife from giving her property to her husband if she pleases; nor does it abrogate the presumption that under circumstances such as obtained in this case she has done so. (Opinion by Fauntleroy, J.)

It is further insisted by the appellee that the decree of the circuit court perpetually enjoining the sale is right for another reason. In the divorce suit of *Throckmorton v. Throckmorton*, *supra*, the question as to property rights of the wife was raised, and by the decree in that cause they were disposed of by the decree of absolute divorce, without settling the property rights, and the rights of property were left where they were at the date of the decree. *Porter v. Porter*, 27 Gratt., 599. These rights certainly might have been disposed of in the divorce suit, and so the matter is *res adjudicata*. *Campbell v. Campbell*, 22 Gratt., 666; *Findlay v. Trigg*, 83 Va., 543. The debt in controversy has been fully paid and discharged, the appellee is entitled to hold the land free and released from the lien of the trust deed; and it was the duty of the creditor within ninety

Opinion.

days to have entered upon the margin of the book where such deed is recorded a release thereof, under our statute, and for failure to do so he is liable to a fine of twenty dollars. Code of Virginia, § 2498. There was no error in the decree of the circuit court complained of and appealed from here, and the same is affirmed.

FAUNTLEROY, J., dissented.

DECREE AFFIRMED.

Richmond.

WELCH v. COMMONWEALTH.

NOVEMBER 16th, 1893.

1. CRIMINAL PROCEEDINGS—*Continuances*.—For the principles on which continuances are granted in criminal cases see opinion of Lacy, J.
2. *IDEM*—*Case at bar*.—A days before trial a summons was issued and delivered to the sheriff for a witness residing in the same town. The summons was returned "not found." Defendant made affidavit to his materialty and that he could not safely go to trial without him. Trial court overruled the motion for continuance on the sole ground that the statements of the defendant under oath were not to be credited.

HELD:

Error.

Error to judgment of corporation court of city of Norfolk, rendered March 7, 1893, whereby John Welsh, the plaintiff in error, was sentenced to confinement in the penitentiary for the period of seven years. Opinion states the case.

John Neely, for the plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LACY, J., delivered the opinion of the court.

The plaintiff in error was indicted in the corporation court of Norfolk for grand larceny on the 7th day of March, 1893, and on the 24th day of the same month he was tried by a jury and convicted, and his term of imprisonment fixed at seven

Opinion.

years in the penitentiary. The accused moved the court to set aside the said verdict and grant to him a new trial; but the court overruled the motion and rendered judgment in accordance with the verdict, and the prisoner excepted. The prisoner thereupon brought the case here by writ of error. There were two exceptions taken by the plaintiff in error to the rulings of the court, which are assigned as error here. The first is that on the calling of the case the defendant moved the court to continue the case, on the ground of the absence of a witness wanted in his defence, and in support of the motion filed the following affidavit: "John Welsh, the defendant, being first duly sworn, says that upon the trial of the above-mentioned indictment he desires to introduce Sidney Hoffheimer as a witness in his behalf; that said Hoffheimer was present in the city of Norfolk at the time of the occurrences which constitute the subject of said indictment; that he is a material witness for the defendant, and can prove facts not within the knowledge of any other witness procurable by the defendant; that this defendant has caused to be issued subpoenas for the attendance of this witness, returnable to the first day of this term and to this day, directed to the sergeant of the city of Norfolk, which subpoenas have been returned 'Not found;' that the said witness has not been kept from attendance by the solicitation or procurement of this defendant, or by any connivance of his, and that he has used every effort in his power, in addition to the issuing of process as aforesaid, to secure his attendance." Subscribed and sworn to the same day. The court overruled this motion, and ordered the trial to proceed, and the defendant was found guilty by the jury, as stated above.

In support of his motion to set aside the verdict and grant him a new trial the defendant filed another affidavit, as follows: "John Welsh, the defendant, being first duly sworn, says that Sidney Hoffheimer, the witness mentioned by him in a previous affidavit, filed upon his motion for a continuance of this

Opinion.

case, is a resident of the city of Norfolk, and, as this defendant believes, is only temporarily out of the said city. This defendant believes that the attendance of the said Hoffheimer can be procured at the May term next of this court. He says that the said Hoffheimer was present at the time when and place where the larceny charged in the indictment is alleged to have been committed by this defendant, and this defendant verily believes from statements subsequently made by said Hoffheimer to him, will swear that this defendant did not commit the same." Subscribed and sworn to the 31st day of March, 1893. But the court refused to allow the said affidavit to be filed, or to consider the same in connection with said motion for a new trial, to which action and ruling of the court the prisoner again excepted, and filed his bill of exceptions. The defendant filed a third bill of exceptions to the action of the court in overruling his motion to set aside the verdict and grant to him a new trial. This is the whole case as it appears here; and the main question is whether the court below erred in refusing to continue the case, on the motion of the defendant, on account of the absence of a material witness.

The rule upon which the court proceeds in considering a motion for a continuance is well settled, and has often been the subject of decision in this court. In *Hewitt's Case*, 17 Gratt., 629, Judge Moncure said on this subject: "A motion for a continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and though an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous. As a general rule, when a witness for a party fails to appear at the time appointed for a trial, if such party show that a subpoena for the witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides a reasonable time before the time for the trial, and shall swear that the witness is material, and

Opinion.

that he cannot safely go to trial without his testimony, a continuance ought to be granted. The party thus shows *prima facie* that he is not ready for trial, though he has used due diligence to be so; and, in the absence of anything to show the contrary, the court ought to give him credit for honesty of intention, and continue the case, if there be reasonable ground to believe that the attendance of the witness at the next term of the court can be secured; especially if the case has not been before continued for the same cause. But circumstances may satisfy the court that the real purpose of the party in moving for a continuance is to delay or evade the trial, and not to prepare for it; and in such case, of course, the motion ought to be overruled." See 3 Rob. Pr. (Old), 140, 141; Savage, C. J., in *People v. Vermilyea*, 7 Cow., 383; *State v. Lewis*, 1 Bay, 1; *Com. v. Knapp*, 9 Pick., 515; *Russell's Case*, 28 Gratt., 936; opinion of Burks, J., citing and approving Judge Moncure's opinion in *Hewitt's Case*, *supra*; *Gwathkin v. Com.*, 10 Leigh, 687; *Walton's Case*, 32 Gratt., 863, opinion of Judge Moncure, a case very similar to this case; *Hook v. Nanny*, 4 Hen. & M., 157, note; *Higginbotham v. Chamberlayne*, 4 Munf., 547; *Deford v. Hayes*, 6 Munf., 390; *Harris v. Harris*, 2 Leigh, 584; *Harman v. Howe*, 27 Gratt., 676; *Bland & Giles County Judge Case*, 33 Gratt., 447. The authorities on this subject are collated in an admirable article in 3 Amer. & Eng., Enc. Law, 804, 821.

In this case only a few days had elapsed between the indictment and the trial. A summons for the witness had been placed in the hands of the sheriff for the witness, who resided in the same town. It was returned "not found," and the witness was not present. No lack of diligence appears or is hinted at on the part of the prisoner. He made affidavit in due form to the materiality of the witness, and the necessity for his presence at the trial to prevent a miscarriage of justice. The court overruled the motion for a continuance upon the sole ground, as appears from these circumstances, that the statements of the prisoner under oath and uncontradicted were not

Opinion.

credited by the court; because, if the statements had been credited by the court, it is not reasonable to consider that the motion would have been overruled by the court. We think the court erred in refusing to continue the case under these circumstances. The court should have given the prisoner credit for honesty of intention, as is said in all the cases, and ought to have continued the case. For this error of the said court the said judgment must be reversed and annulled, and the case remanded for a new trial to be had therein.

JUDGMENT REVERSED.

Richmond.

CHASE V. MILLER.

NOVEMBER 16th, 1893.

RESCISSION—Fraud—Evidence—Case at bar.—Vendor sued to rescind sale of land on the ground that vendee misrepresented his ability to pay. Vendor was informed that vendee expected certain money. After the sale, but before vendee was put into possession, he told the former he was disappointed in his expectation. The cash payment was made, but not so the deferred payments. The vendor knowing the vendees disappointment, sought to enforce the contract. There was no evidence of fraudulent representations, though present insolvency was proved.

Held:

Vendor was not entitled to rescind the sale, his remedy being to ask for specific performance and sale of the land.

Argued at Staunton. Decided at Richmond.

Appeal from decree of circuit court of Frederick county, rendered July 15, 1892, in a chancery suit, wherein J. M. Miller was complainant, and W. C. Chase, the appellant, was defendant. Opinion states the case.

Holmes Conrad, for appellant.

John J. Williams, for appellee.

LACY, J. delivered the opinion of the court.

The bill was filed in this cause by the appellee, J. M. Miller, seeking the rescission of a contract between him and the

Opinion.

appellant, W. C. Chase, for the sale by Miller to Chase of a tract of land called "Vaucluse," situated in the said county, executed April 18, 1892, under which Miller had put Chase in possession; and to reinvest Miller with the title, legal and equitable, and to restore Miller to the possession; to have an account of the payments made by Chase, and for the appointment of a receiver to take charge of the tract of land in question; and for an account of the rents, profits, and proceeds of the land; and praying an injunction to enjoin and restrain the defendant and his agents from disposing of any proceeds of the land, leasing or renting or selling the same, or any part thereof, and from cutting wood from the land. The ground upon which the rescission is asked is that the defendant fraudulently deceived the plaintiff as to his means of paying for the land, falsely stating that he had made sales of valuable property, by the proceeds of which he could pay for the land. The defendant demurred and answered. In his answer he denied that he had ever made any false or fraudulent representations as an inducement to the sale; that at the time of the purchase he had, in his opinion, ample means to pay for the land; that he had made some payments, and had used his best ability to make sale of enough of his property to meet this indebtedness, but had been disappointed. The depositions are taken, which show that the seller was anxious to sell and the buyer equally anxious to buy at the price demanded. The dispute between them was not as to the price of the property, but as to the terms of payment. The seller demanded \$15,000 for the land, and the buyer agreed to pay that sum for it. But the seller demanded a down payment of \$5,000; but the buyer did not agree to this, because, as he stated, it was out of his power to pay so much cash. Finally, at the railway station, when they were awaiting the train upon which the proposed buyer was to depart, the seller suggested that something be put in writing, it appearing that they were agreed as to the amount of the purchase price. The defendant then, in April,

Opinion.

1890, wrote and delivered a contract in writing, which was signed by both, by which the sale was agreed to, but the time of making the cash payment was left to future agreement, and it was provided as to this as follows: "Said sale is made under following conditions, to-wit: Said Chase is to pay unto said Miller, on or before the 1st day of July, 1890, the sum of five hundred dollars, being the first payment of the purchase money for the said tract or farm, and to pay the balance (\$14,500), fourteen thousand five hundred dollars, in payments hereinafter to be determined upon by and between said Miller and Chase, provided such payments shall not be less than (\$5,000) five thousand dollars per year, with six per cent interest from 1st of January, 1891, and said payments to be paid in not less than — months from date hereof, and other or residue payments to be paid in full on or before 1st of January, 1893, until the purchase price of \$15,000 shall be fully paid as herein mentioned." It was provided also that Chase was not to disturb the tenant then on the farm before the expiration of the crop year, and that Chase was not to have any of the crops of that year unless he paid the \$5,000 by the first day of November following, and not to pay the taxes unless he got the crops, and that Miller was to have the use of a spring on the farm for life. Miller hesitated, he says, but signed and delivered the contract. Chase departed in a few minutes on the train, but came back before the 1st of June, and was put in possession of the farm, and paid the \$500 in a manner satisfactory to Miller by getting the agent of Miller, in selling the land, his son-in-law and nephew Long, to receipt to Miller for \$500, and take him on the claim. He gave Miller a draft for \$2,000, which was protested, and, except small sums (\$500 in sheep, \$150 in a carriage, and \$250—this said to be for crops), has paid nothing. Chase not complying with his contract, in April, 1891, Miller repudiated it on his part, and brought an action of unlawful detainer in the county court to recover the possession of the land, when and in which action there was verdict and judg-

Opinion.

ment for Miller, which, on Chase's appeal, was affirmed in the circuit court of Frederick county. From this judgment Chase obtained a writ of error to this court, where that controversy is still pending and undetermined; when, in April, 1892, Miller brought this suit to set aside the contract for fraud, as stated above.

The contract having been mutually agreed to in writing, and the terms of it as to payments of the purchase money having been broken by Chase, who, as we have seen, was to pay \$5,000 by the 1st of January, 1891, and Chase having been put in possession by Miller, and part of the purchase money having been paid, and a large part due and unpaid, we are not informed why Miller did not seek to have the contract enforced, and the land sold to satisfy the purchase money due and unpaid. It must be borne in mind that Miller is the vendor, and the fraud alleged is as to false representations made by Chase as to his means of making payment; and there is no allegation of insolvency on the part of Chase at the time of making the contract, but present insolvency is charged in the bill, and may be said to be proved, outside of the land, of which, in equity, Chase is regarded as the owner, and Miller as owner of the purchase money. The contract not having been complied with by Chase, Miller has the right to go into equity, and have it enforced against Chase, and the land subjected to the satisfaction of his debt, for which it stands as security. There is a failure to pay on the part of Chase, and he is, under his contract, liable to pay the debt. But the evidence shows that at the time of entering into the contract Chase had an expectation in South Carolina of an interest in a vineyard, as he says; and, as Miller alleges, the ownership of the vineyard was asserted to him. But the evidence shows that before he was put in possession of the tract of land Chase informed Miller that he had been disappointed as to this vineyard, and could not get any money from that source. It seems that Chase had information of a sale of stock, for which he

Opinion.

was to get \$3,666 66, and on which he drafted in Miller's favor for \$2,000 towards the cash payment. But here the sale failed, and Chase failed to realize according to his expectations. What Chase's other expectations were we do not know. He now appears to be insolvent. But the evidence does not sustain the allegations of fraud or of false representations made in the bill. Chase informed Miller before the contract was written of his inability at that time to make any considerable cash payment, and the parties had left Miller's house, where the negotiations were going on; and Chase started on his way homeward, when Miller asked for and obtained a written contract with Chase for the sale, time of payments to be thereafter agreed on, and Chase was subsequently put in possession by Miller, after Miller had been informed that the vineyard sale had been a failure. Miller held on to the contract, and sought to obtain a compliance from Chase after he knew all. This suit, therefore, appears to be an effort to claim against a contract, under which, with full knowledge, he asserted his rights. His remedy is for specific enforcement of the contract between himself and his vendee and his debtor. Upon the allegations of the bill there was no insolvency of the purchaser, and subsequent insolvency does not constitute a ground for a rescission of the contract. The action of the circuit court in rescinding the contract and decreeing an account of the partial payments—of the profits of the land—to be offset against them is erroneous, and must be reversed and annulled, and the cause remanded to the circuit court, where the plaintiff may amend his bill as he may be advised.

FAUNTLEROY, J., and HINTON, J., dissented.

DECREE REVERSED.

Richmond.

BENTON v. COMMONWEALTH.

NOVEMBER 23d, 1893.

1. CRIMINAL PROCEEDINGS—*Speedy trial—Continuance.*—Motion for continuance is always within the sound discretion of the court, to be exercised fairly with due regard to the circumstances and the law enacted pursuant to article 1, section 10, of the constitution, declaring that “in all criminal prosecutions a man hath a right to a speedy trial.” Code, § 4016.
2. IDEM—*Case at bar.*—Defendant, in jail since September, 1892, all the time ready for trial, demanded trial on February 15, 1893, his case being set for trial on that day. Commonwealth announced that it had made no preparation for trial on that day, and had recalled processes for witnesses and could offer no evidence at that term. The court then continued the case until March 16th, the day of expiration of sentence of commonwealth’s witness, B, who was then in jail for a felony, and incompetent to testify.

HELD:

Such continuance was a reversible error.

Error to judgment of circuit court of Loudoun county, rendered April 13, 1893, refusing a writ of error to the judgment of the county court of said county, whereby the plaintiff in error, D. W. Benton, was sentenced to confinement in the State penitentiary for the period of two and a half years for a felony. Opinion states the case.

Garrett & Garrett, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

FAUNTLEROY, J., delivered the opinion of the court.

Opinion.

D. W. Benton, the plaintiff in error, was indicted in the county court of Loudoun county, on the 8th day of August, 1892, of a felony, for which he was tried at the September term of the said court, 1892, and convicted and sentenced to be imprisoned in the penitentiary for a term of two years and six months. Upon a writ of error to this proceeding the circuit court of Loudoun county set aside this verdict and judgment, and ordered a new trial, which was had at the November, 1892, term of the county court of Loudoun county, when he was again convicted and sentenced. He obtained from this court a writ of error and supersedeas to this second conviction and judgment, which, upon the hearing, were reversed and set aside, and a new trial was ordered by this court, which judgment of this court was certified back to and was received by the clerk of the said trial court, the county court of Loudoun county, at 11:30 A. M., on the 2nd day of February, 1893, more than eleven days before the commencement of the February, 1893, term of the said county court of Loudoun county. At an interview on the said 2nd day of February, 1893, between the prisoner's counsel and the judge of the said court, at which the attorney for the commonwealth was present and conferring, the case of the prisoner was set for trial to be had on the first day of the then coming February term, 1893, according to the requirement of the statute; and the clerk of the said court, in preparation for the said trial, issued the summonses for the witnesses for the commonwealth accordingly for their attendance at the said trial of the prisoner so set for the first day of the said February term, 1893, by the order of the judge of the said county court of Loudoun county as aforesaid. On that same day, to-wit, on the 2nd day of February, 1893, the commonwealth's attorney for the county of Loudoun addressed a card to the clerk of the said county court, saying, that when he wanted the witnesses for the commonwealth summoned he would present the clerk with a list, and the

summonses that he, the clerk had issued, he would recall for the present. This the clerk did on the morning of the 3d, and none of the commonwealth's witnesses were summoned.

On the 2d day of February, 1893, the commonwealth's attorney stated to the judge of the county court and to the counsel for the prisoner, that he would not be ready at the next term for trial, and then said that the main reason—the chief reason—for a continuance, was that Welby Barton's time in jail would not expire until the 16th day of March, 1893, (which is an admitted fact) at which time he would be a competent witness. The said R. Welby Barton was then serving a term of imprisonment for a felony of which he had been tried and convicted and sentenced in the county court of Loudoun county.

The case was called upon the 13th day of February, 1893, the first day of the term, and the prisoner (who has been in jail since the — day of September, 1892) was set to the bar in the custody of the jailor of the county court of Loudoun county; whereupon the commonwealth's attorney stated he had made no preparation to try the case at this term, and asked for a continuance of the same; to which the prisoner objected and demanded a trial, offering to admit as true, for the trial of the motion and the case; if had to-day, all the evidence the commonwealth had heretofore offered against him, except that of R. W. Barton and Herbert Wilson, who have been disqualified to testify in any case by the law of Virginia, and are not now competent or admissible witnesses. The commonwealth's attorney stated that he had no evidence to offer to remove the disability of the witness, Barton, at this time, and acknowledged that if forced to trial, or without the evidence of Barton at this time, he would enter a *nolle prosequi*.

The demand of the prisoner to be tried was denied by the court, and the continuance, on the motion of the commonwealth's attorney, was granted to the March term, 1893—the

Opinion.

16th of that Month. To which said action of the county court the prisoner objected and duly excepted, as set forth in his first bill of exceptions. On the 16th day of March, 1893, the case was called for trial; whereupon the prisoner moved the court to dismiss the prosecution and discharge him, because he had not been tried at the last (February) term of the court, at which time he, the prisoner, was ready for trial and demanded to be tried. And in support of this motion offered the bill of exceptions taken at the February term to the continuance; which motion the court overruled and the prisoner duly excepted, as set forth in his first bill of exceptions. The prisoner was then put upon trial, and the jury found him guilty of grand larceny as charged in the indictment, and fixed his punishment at two year's confinement in the penitentiary. Thereupon the prisoner moved to set the verdict aside because it was contrary to the law and the evidence, and moved in arrest of judgment and for a new trial. Which several motions the trial court denied, and pronounced judgment upon the verdict.

A motion for a continuance is always within the sound discretion of the court, to be exercised not arbitrarily, but, with due regard to all the circumstances of the case, fairly, and with conformity to the law of the land enacted in pursuance of the provisions of the constitution of Virginia, article 1, section 10, which declares that "in all criminal prosecutions a man hath a right to a speedy trial." In pursuance of this provision of the constitution, the statute (Code of 1887, section 4016) enacts "when an indictment is found against a person for a felony in a court wherein he may be tried, the accused, if in custody, * * * shall, unless good cause be shown for a continuance, be arraigned and tried at the same term"—at which an indictment is found. The "speedy trial," and the policy of the law to expedite the trial of criminal cases, forbid that the person accused of crime shall be detained in

Opinion.

prison beyond any term of the court at which he may be lawfully tried unless good cause be shown for a continuance; and the Acts, 1889-90, p. 79, require the judges of the county courts to set the criminal cases for trial ten days before the first day of the terms of their courts; the object of which requirement is, as interpreted by this court in *Hall's Case*, 89 Va., 171, to insure a speedy trial, for the benefit of the accused no less than for the commonwealth.

When the accused is ready for and demands trial by a court wherein he stands indicted, and may be lawfully tried, he is entitled to trial without delay, unless the prosecution shall show good cause for a continuance. The prisoner, a thrifty young farmer of the county of Loudoun, had been incarcerated in the county jail and denied the privilege of bail since September, 1892, upon a felonious charge, for which he was always ready and anxious to be tried, and his case was set for trial on the 15th day of February, 1893—the first day of the regular term of the county court of Loudoun county in which he stood indicted—by the judge of that court eleven days before the beginning of the term. His case was regularly called, and he being set to the bar of that court in the custody of his jailor, demanded to be then and there put upon trial. The commonwealth's attorney announced that he had made no preparation for the trial at that term; that he had peremptorily recalled the processes issued by the clerk ten days before for the summoning of the witnesses for the commonwealth; and that he could not offer any testimony to convict the prisoner at that term of the court, even though the prisoner offered to admit as true the statements of all the commonwealth's witnesses who had not been summoned, except that of R. Welby Barton, who was then a convicted felon serving out his term of imprisonment, and incompetent to testify in a court of justice. That, if ruled to trial at that term of the court, he would enter a *nolle prosequi*. Upon this

Opinion.

statement the court granted the motion of the commonwealth's attorney and continued the case till the March term of the court, and denied the prisoner's demand for a trial at that term of the court. This arbitrary continuance was granted by the court solely upon the ground, suggested by the commonwealth's attorney, that he could not convict the prisoner without the testimony of one R. W. Barton, a convicted felon, whose term of imprisonment would expire on the 16th day of March, 1893; and who, by his own confession, was an accomplice in the crime charged against the prisoner, for which he had been given immunity from arrest or prosecution, as an approver of State's evidence.

If the court could thus, by its own arbitrary action, deny to the prisoner the trial set for the 15th day of February, and then demanded by him, and remand him to jail until the 16th day of March, 1893, to await the expiration of the term of imprisonment of a convicted felon, where is the limit of the discretion and the line of demarkation, which will restrain a judge from holding a prisoner bound and incarcerated, indefinitely, upon a charge of which the law presumes him innocent, to await the expiration of the longest term of any felon undergoing the penalty of his crime. The principle is the same, whether the time be for thirty days or thirty months.

The county court of Loudoun county at its February, 1893, term, without good cause or warrant of law, continued the prisoner's case till the 16th day of March, 1893, and thus denied to him the speedy trial guaranteed to him by the law and constitution of Virginia. No person can be arbitrarily held and imprisoned without trial. In the case of the *United States v. Fox*, 3 Montana T., 513, Fox was indicted, at the November term, 1879, for forgery, &c. At that term two juries failed to agree, and were, with the consent of the defendant, discharged. At the March term following, 1880, the United States was not ready for trial, because Congress had failed to

Opinion.

appropriate money with which the marshal could defray the expenses of summoning witnesses, and the witnesses were not summoned, and because of the absence of these witnesses the trial court continued the case. Fox applied, by *habeas corpus*, to be discharged, and his motion was overruled by the trial judge; but the supreme court reversed the trial judge and discharged the prisoner.

In the case of *Klock v. People*, 2 Park, 676, the court held that it was not allowable, and was a denial of a "speedy trial" for a public prosecutor to arrest the trial of a prisoner so as to enable him to try the accused at a subsequent term, solely because he finds himself unprepared with the evidence to convict, when his condition is not the result of improper practice on the part of the prisoner, or some one acting with or for him. And that it was a denial of a speedy trial if the prosecution had neglected or failed to procure the attendance of witnesses who had not been summoned; and that it is not material to inquire for what reason the prosecution so failed or neglected to prepare for trial, the fact of such failure or neglect is sufficient.

For the foregoing reasons, we are of opinion to reverse the judgment of the county court of Loudoun county; and this renders it unnecessary to state and analyze the evidence upon which the prisoner was convicted. It is sufficient to say that it was, in character and certainty, wholly insufficient to warrant the verdict of guilty, consisting mainly and essentially of the uncorroborated statements (vague and indefinite as to the value of the property alleged to have been stolen) of the witness, R. W. Barton, a released felon, that day only out of jail and a self-confessed accomplice in the crime, which he had every motive to fasten upon D. W. Benton as the consideration for his own immunity from prosecution and punishment for it by the commonwealth.

The county court of Loudoun county erred in overruling

Opinion.

the motion of the prisoner to set the verdict aside on the ground that it was contrary to the law and the evidence, and in overruling the motion in arrest of judgment.

The verdict must be set aside; the judgment reversed and annuled.

LEWIS, P., and LACY, J., dissented.

JUDGMENT REVERSED.

Richmond.

WHITE v. OFFIELD.

DECEMBER 7th, 1893.

PERSONAL REPRESENTATIVES—Payment—Limitations—Case at bar.—Balance in administrator's hands at settlement of his accounts was ordered in 1868 to be apportioned among the creditors, the amount to each being ascertained. In 1887 a creditor filed his bill to establish his claim against the administrator's sureties. On demurrer the bill was dismissed and never amended, nor the decision reversed. He then filed his petition in a lien suit pending against the administrator, asking that his debt be paid out of the fund.

HELD:

- (1) The order, which was in effect a judgment, was barred in ten years.
- (2) The lapse of time raises the presumption of payment, and the laches are fatal.
- (3) The question having been decided and the suit dismissed, and no appeal taken, the question is *res judicata*.

Appeal from decree of circuit court of Greene county, rendered at its June term, 1890, in a chancery proceeding wherein R. M. White, the appellant, was plaintiff, and James Offield and others were defendants. Opinion states the case.

D. Harman, Jr., for appellant.

John E. Roller and *Duke & Duke*, for appellees.

LACY, J., delivered the opinion of the court.

Opinion.

The appellant, R. M. White, filed his petition in the circuit court of Greene county, in the cause therein of *Davis v. Offield*, seeking to have a certain debt claimed to be due to him by James Offield's estate paid out of the funds in the hands of the court, arising from the sale of the said lands in a creditor's suit against Offield. He sought to have his petition filed in June, 1889. His claim is that his brother, William W. White, had died in October, 1865, leaving a considerable personal estate, and that James Offield had qualified as administrator of his estate in the same month, in the county court of Greene. At the February term following, in 1866, of the said court, an order was entered requiring the said Offield to settle his accounts before a commissioner, and, in pursuance of said order, his accounts were settled, and it was found that there was in his hands as administrator a net balance of \$922 36 for distribution among the creditors of said William W. White's estate. The debts were in excess of the assets, and the amount was apportioned by the court, and the interest of each creditor ascertained, and the report confirmed March, 1868. In 1887 the said petitioner, R. M. White, filed his bill in chancery against Offield and his securities, seeking to establish his claim against White's estate against Offield and his sureties, and make it out of the latter, regarding the former as insolvent; but his bill was demurred to, demurrer sustained, the bill never amended, and that suit was dismissed. That in that suit the court decided that he had a judgment against the said Offield by reason of the said proceedings in the county court, and was barred by the statute of limitations. The petitioner asked leave to file his petition in the lien creditor's suit in the said court in the style of *Davis v. Offield*, and the other cases consolidated with it, and that his debt might be declared the first lien on the land, and paid first out of the fund.

At the June term, 1889, of said court, Offield demurred to and answered the said petition. He denied that he owed anything to the creditors of W. W. White. That, many years

Opinion.

before, he had settled his accounts, and returned his vouchers to the clerk's office ; and that by reason of the lapse of so great length of time, or by reason of some unknown cause, they had been misplaced and lost in the clerk's office, and had not yet been found. That the recited orders of the county court in 1868 were not, in his opinion, judgments, but, if so, still they were obtained March, 1868, more than twenty years before, no execution had ever issued on them, and they were barred ; and that the demand is stale, by reason of the laches of the creditor, and ought not to be enforced in a court of equity ; and, moreover, the said petitioner, at the March rules, 1887, filed his bill against him and his sureties on his official bond as administrator of W. W. White, for the purpose of enforcing his supposed judgments, and at the June term the court decided that he had no valid claim, and dismissed his bill, and he went out of court. That the said bill raised the same questions as those now raised by the petition, and the decree dismissing the said bill was never appealed from, and has become final and irrevocable. That in that suit, by that decree, were settled all the questions involved in that suit actually decided, and all such as might properly have been decided therein, or were involved therein, and therefore the questions now raised are the same questions raised again between the same parties, and are *res adjudicata* and cannot be again heard or decided, and the petition ought to be dismissed, which was done, accordingly, by the court. The circuit court decided that these were judgments, or had the effect of judgments, and were liable to the rules of law applicable to judgments, and were barred by the statute of limitations, no execution having been issued nor *scire facias* sued out thereon within ten years, and dismissed the petition, with costs ; whereupon the petitioner, the appellant here, applied for and obtained an appeal to this court.

The decree is plainly right. There is no ground upon which any other could have been placed. (1) The judgments were

Opinion.

barred after the lapse of ten years. (2) The great lapse of time raises the presumption of payment, and the *laches* of the parties in asserting their claims are fatal. (3) The questions having been decided and the suit dismissed, and no appeal taken, the question is *res adjudicata*, and cannot be again raised. *McCormick v. Wright*, 79 Va., 533; *Campbell v. Campbell*, 22 Gratt., 665; *Insurance Co. v. Clemmitt*, 77 Va., 366; *Miller v. Cook*, Id. 806; *Hutcheson v. Grubbs*, 80 Va., 251; *Rowe v. Bentley*, 29 Gratt., 756; *Fleming v. Dunlop*, 4 Leigh, 338; *Brown v. Butler*, 87 Va., 626. For the foregoing reasons, the decree appealed from must be affirmed.

DECREE AFFIRMED.

Richmond.

DANVILLE & WESTERN R. R. Co. v. BROWN.

NOVEMBER 16th, 1893.

1. COMMON LAW PRACTICE—*Alias writ*.—Where previous writs of summons have failed for ineffectual service or other irregularities, plaintiff is entitled to an alias writ.
2. IDEM—*Continuance*.—Where plaintiff is allowed to make at bar an immaterial amendment to his declaration; *held*, not error to refuse defendant a continuance on that ground.
3. APPOINTMENT—*Acceptance—Defence*.—Where one is notified of his appointment as a director without declining it, and afterwards receives a summons for the company without remonstrating; *held*, his acceptance may be presumed, and it is no defence for the company that he, in the absence of collusion, failed to deliver the summons.
4. NEGLIGENT INJURY—*Licensee*.—Where one has been notified by defendant company that certain freight has arrived for him at its depot, and whilst walking along the passage to the freight room he is injured by several carelessly piled boxes of iron falling on him; *held*, he is a licensee, and the company is liable in damages.

Error to judgment of circuit court of Henry county, rendered October 15, 1891, in an action of trespass on the case, wherein H. T. Brown was plaintiff and the Danville and Western Railroad Company was defendant. Verdict and judgment being for plaintiff, defendant brought the case here on error and *supersedeas*. Opinion states the case.

Green & Miller, for plaintiff in error.

Anderson & Hairston and *W. R. Staples*, for defendant in error.

HINTON, J., delivered the opinion of the court.

This was an action of tort brought to recover damages for injuries sustained by the plaintiff at the depot of the defendant company, at Martinsville, Va., where he had gone for the purpose of looking for some freight, for which he had received a bill of lading from New York.

At the trial the jury returned a verdict in favor of the plaintiff for the sum of \$7,500, and the company applied for and obtained a writ of error from one of the judges of this court.

The first and chief cause of complaint is, that the circuit court refused to quash all the processes and to remand the case to rules. It appears from the record that the plaintiff, on the 9th day of May, 1891, sued out a summons from the circuit court of Henry county, returnable to the third Monday in May, 1891, when he filed his declaration in the clerk's office, and the case was continued for process. On the 6th day of July, 1891, an *alias* summons issued directed to the sergeant of Danville, on which no rules were taken. On the 27th day of August, 1891, the plaintiff sued out an *alias* summons, returnable to the third Monday in September, 1891, directed to the sheriff of Henry county, which summons was returned as executed by delivering a copy to H. C. Lester, a director of the defendant company, on the 29th of August, 1891, and on this last summons the rules were taken at the 2d September rules and 1st October rules, and the case was placed on the docket for trial at the October term, 1891. When the case was called for trial, the defendant company moved the court to quash the process and remand the cause to rules; and, in support of his motion, proved the above irregularities. But the court overruled this motion, and this action of the court is made the chief assignment of error in this court.

Without going, however, into a lengthy discussion of this point, we think it sufficient to say that the motion was properly overruled for the reason stated in the brief of counsel for

Opinion.

the plaintiff in error, namely, it was too broad in its scope. If this motion had prevailed, as the counsel very properly say, and the court had quashed all the processes which had been issued, there would have been no case, and nothing to remand to the rules. But, apart from this reason, we think that the process of August 27, 1891, by whatever name it may be called, is good and valid as an original process. The simple circumstance that it is characterized as an "*alias writ*," and that it runs, "We command you *as we have before*," or "*at another time* commanded you," &c., cannot possibly affect or change its essential character or render it less effectual as a process for bringing the defendant before the court, and this is all that any original summons does. The only limitation in law upon the power of the plaintiff in a suit to have issued as many writs as he may deem proper, is that he is not permitted to harass or vex the defendant with unnecessary costs. But if, as in a case like the present, previous writs, by reason of any irregularity in the *service merely*, have failed to bring the defendant into court, there seems to be no good reason why he may not issue an *alias* without being amenable to the charge of unduly vexing the defendant with costs.

The next objection is that H. C. Lester was not a director of the company at the time of serving the process on him, and did not inform the company of the fact. But the first of these allegations is not sustained by the record, for he is shown to have received a letter from Mr. Wilcox Brown, notifying him of his election on the 3d of August, 1891; whereupon, he says, he determined to accept at once, and he subsequently evidenced his acceptance by receiving the summons without remonstrance or disclaimer, and by other official acts since. Independently of these acts, he must be presumed to have accepted when notified of his appointment, unless he expressly declined it. 1 Wood's R. R. Laws, sec. 149; 9 R. I. Rep., 308. And as to his not having delivered the summons to the company, we cannot perceive how this circumstance, in ab-

Opinion.

sence of fraud or collusion, neither of which are shown, could possibly affect the right of the plaintiff. He did all that he was required to do. In point of fact, however, this failure of Lester to inform the company does not appear to have worked any harm to the company, for when the case was called the defendant was in court, with its counsel and witnesses ready for trial, so that it must have been notified of the suit in ample time for necessary preparations for the trial.

The next objection is the refusal of the court to continue the case for the defendant. This motion seems to have been based solely upon the ground that the court had permitted the plaintiff to amend his declaration at the bar of the court by inserting the following words: "Of which fact the defendant company had notice, or by the use of reasonable diligence might have had notice," an amendment which we consider unnecessary.

An averment of notice on the part of the defendant is never required where the fact lies as much within the knowledge of the defendant as the plaintiff. 1 Saunders on Pleading and Evidence, 214-215. And in this case it fully appears that the company's agent had notice that the platform where the accident occurred was used as a passway to the freight room, there was no necessity for averring it, as the knowledge of the agent is the knowledge of the principal.

Upon the facts there can be no doubt of the correctness of the verdict. The plaintiff, as was customary, was walking, in company with two other persons, along a platform which was used as a passway to the freight room for the purpose of seeing as to some freight which he was expecting, when several boxes of sheet iron, weighing about 800 pounds, which had been carelessly placed on its edge, fell over on the plaintiff, breaking his thigh and occasioning a consequent shortening of the leg. This brings the case directly within the principles announced in *Va. Mid. R. R. Co. v. White*, 84 Va., 505. The plaintiff was a licensee, and was entitled to have the de-

Opinion.

fendant company exercise ordinary care and prudence towards him. The company plainly failed to discharge its duty in this respect, and is therefore liable.

Finally, there is nothing in the amount of the verdict in this case that discloses either passion or prejudice on the part of the jury, and the judgment of the circuit court must therefore be affirmed.

FAUNTLEROY, J., dissented.

JUDGMENT AFFIRMED.

Richmond.

KING v. LYNN, PENITENTIARY SUPERINTENDENT.

NOVEMBER 23d, 1893.

CONSTITUTION—*Habeas corpus*—*Case at bar*.—K. was received in the penitentiary October 16, 1885, from the city of Richmond, and again February 14, 1891, from New Kent county. He was taken February 5, 1892, before the circuit court of said city and arraigned and identified as the same person who had been twice convicted, and was sentenced to five years additional confinement. These proceedings were under Code, §§ 4179, 4180, 4182, and 4183. On his petition for a writ of *habeas corpus*,

HELD :

Those sections are constitutional and valid, and the proceedings under them were regular, and the writ is denied.

R. Carter Scott and *W. R. Booker*, for petitioner.

Attorney-General R. Taylor Scott, for respondent.

HINTON, J., delivered the opinion of the court.

Section 4179 of the Code of 1887 makes the circuit court of the city of Richmond the court for the trial of all criminal proceedings against convicts in the penitentiary.

Section 4180 provides that "when a person convicted of an offence, and sentenced to confinement in the penitentiary, is received therein, if he was before sentenced to a like punishment, and the record of his conviction does not show that he has been sentenced under sections 3905 or 3906, the superin-

Opinion.

tendent of the penitentiary shall give information thereof, without delay, to the said circuit court of the city of Richmond, whether it be alleged or not in the indictment on which he was so convicted, that he had been before sentenced to a like punishment."

Section 4181 provides that "the said court shall cause the convict to be brought before it, and upon an information filed, setting forth the several records of convictions, *and alleging the identity of the prisoner with the person named in each*, shall require the convict to say whether he is the same person or not."

Section 4182 provides that "if he says he is not or remain silent, his plea or the fact of his silence shall be entered of record, and a jury of bystanders shall be impanelled to inquire whether the convict is the same person mentioned in the several records."

Section 4183 provides that "if the jury find that he is not the same person, or if he acknowledge in open court, after being duly cautioned, that he is the same person, the court shall sentence him to such further confinement as is prescribed by chapter 190, on a second or third conviction, as the case may be."

In pursuance of these provisions of the Code, the convict, Scott King *alias* John Walker, was brought, on the 5th day of February, 1892, before the circuit court of Richmond, and there tried upon an information framed in accordance with the statute, adjudged identical with John Walker, and sentenced to five years additional confinement in the penitentiary, to commence from the expiration of his then term of confinement therein.

Thereupon he was brought before this court by the writ of *habeas corpus*, alleging that he is illegally imprisoned and praying to be discharged therefrom.

And the judgment of the circuit court has been assailed upon various grounds, which have been urged with earnestness and ability by the counsel for the prisoner, all of which

Opinion.

are bottomed upon the assumption that the prisoner stands in the position of a person charged with a crime in the first instance, who is presumed to be innocent until he is proved to be guilty, for whose protection the law has provided certain safeguards and formalities, which must be absolutely observed on the trial or the trial will be vitiated. But manifestly this case has no analogy to that, and therefore we shall not examine them.

Here it cannot be denied that there had been two trials and two convictions in due course of procedure and in accordance with the forms of law, the only question is whether the prisoner is the person who was convicted in each case. It is, therefore, a mere question of identification, and it cannot be doubted that the course prescribed by the act of assembly to judicially ascertain this fact, is all that could be expected or required.

By the information he is notified of the records of the several convictions alleged against him, and is charged with being the person convicted in each case; he is allowed to answer and of course to offer any evidence he may have to disprove the fact; and the fact is tried by a jury. This seems to us all that is required by justice or the circumstances of the case.

The case of *Tuttle v. Com.*, 2 Gray, 505, is not in point. In that case the effort was made, under an indictment containing seven counts, each charging the sale of one gill of intoxicating liquor without license, and without alleging any previous conviction of the same offence, or even a finding of that fact by the jury to sentence the prisoner to an increased penalty. This the supreme court of Massachusetts held could not be done. Manifestly what was said in that case can have no application to this.

Upon a careful examination of the case, we think that the provisions of the Code which have been set out in this opinion are constitutional and valid, and that the prayer of the petitioner must be denied.

WRIT DENIED.

Richmond.

MALLORY v. TAYLOR.

DECEMBER 7th, 1893.

1. **ERROR—*Facts not certified.***—Where neither the evidence nor the facts are certified, this court cannot review a judgment setting aside a verdict and awarding a *venire de novo*.
2. **NONSUIT—*Not final judgment.***—By suffering a nonsuit, plaintiff ends his present suit without prejudice to his right to bring another; and it is not a final judgment, but the opposite.

Error to a certain ruling of circuit court of Orange county, rendered March 3, 1891, in an action of ejectment, wherein the plaintiff in error, David C. Mallory, was plaintiff, and Wm. G. Taylor and Robena, his wife, were defendants. Opinion states the case.

J. C. Gibson, J. W. Morton, and A. R. Blakey, for plaintiff in error.

Rixey & Barbour, for defendant in error.

LACY, J., delivered the opinion of the court.

There appears to be no final judgment in this case to which a writ of error can lie. There was a verdict and judgment in this case on the 7th day of October, 1890. But this verdict and judgment were first suspended, and then set aside, and a

Opinion.

venire de novo ordered, whereupon the plaintiff excepted; and there is a bill of exception to this action of the circuit court, showing that the plaintiff (plaintiff in error here) excepted to this action of the court against him, but no facts are, and no evidence is certified, and we have nothing in the record upon which we can review the action of the circuit court and consider whether it be erroneous or otherwise. Upon the calling of the case upon the new trial, and the evidence being heard, but not recorded herein, the defendants demurred to the evidence of the plaintiff, and the plaintiff joined therein; whereupon the plaintiff asked to be allowed to enter a nonsuit, which leave was granted, and, the plaintiff being nonsuited and required to pay the costs, the defendants waived the five dollars damages. So there was end of that suit upon the motion of the plaintiff, the effect of which was that the plaintiff retracted his suit without prejudice (by that action of retracting his suit) to his right to bring another suit when so advised. But this is not a final judgment, and does not come within any provision of section 3454 of the Code of Virginia, and no writ lies thereto. A nonsuit is not a final judgment, but the opposite. 4 Minor Inst., pp. 859, 229; *Tucker v. Sandridge*, 82 Va., 535. Mr. Minor says: "In Virginia all employ the word 'nonsuit' to express any failure on the part of the plaintiff to prosecute his suit, whether upon being called at the trial or any other time. So that it includes not only the idea of a nonsuit proper, but also of a *non prosequitur* and of a *nolle prosequi* (*non pros.* and *nol pros.*, as they are respectively called.) The effect of the nonsuit in this comprehensive sense is to put an end to the pending suit without precluding another for the same cause of action. The nonsuit is resorted to in our practice when the plaintiff finds himself unprepared with evidence to maintain his cause, either in consequence of his being ruled into a trial when he is not ready or for any other reason. By our statute a nonsuit (that is, any voluntary abandonment of the cause)

Opinion.

must be suffered, if at all, before the jury retires from the box." Code, § 3387; 4 Minor Inst., p. 783. The writ of error, therefore, in this case must be dismissed as improvidently awarded.

ERROR DISMISSED.

Richmond.

BEARD'S ADM'R v. CHESAPEAKE & OHIO RY. CO.

DECEMBER 7th, 1893.

1. BRAKEMAN—*Action for injury—Declaration.*—In action against railroad company for the negligent killing of plaintiff's intestate, the declaration substantially averred that it was the duty of the company to have and maintain safe, sound, and suitable brakes to the cars on which the intestate was assigned to duty; that the company was guilty of negligence in suffering the brakes to the cars on which the intestate was employed at the time of his death to become so worn and broken as to be incapable of stopping the train as quickly as otherwise they would have done, and that the intestate's death resulted directly from this negligence on the part of the defendant company:

HELD:

The declaration is sufficient in law.

2. CASES—*Compared and distinguished.*—The facts in the case of *Clark's adm'r v. Railroad Co.*, 78 Va., 700, are dissimilar from the facts in the case at bar except that in both cases the death was caused by collision with an overhead bridge.

Error to judgment of circuit court of Alleghany county, rendered August 16, 1891, in an action of trespass on the case, wherein E. T. Beard's administrator was plaintiff and the Chesapeake and Ohio Railway Company was defendant. The defendant having demurred to the plaintiff's declaration, and the court having sustained the demurrer, the plaintiff brought the case here on a writ of error. Opinion states the case.

John L. Lee and *B. T. Gordon*, for plaintiff in error.

R. L. Parrish and *W. J. Robertson*, for defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

It appears from the record exhibited that the defendant company demurred to the declaration and to each of the four counts thereof; and that the court, by its judgment aforesaid, sustained the said demurrer and dismissed the suit.

The facts of the case, as they are alleged in the declaration and admitted by the demurrer, are substantially and materially as follows: E. T. Beard, the plaintiff's intestate, some time in the year 1889 was employed by the Chesapeake and Ohio Railway Company and assigned to duty as a front brakeman on its freight trains passing through the county of Alleghany. One of the duties of the said Beard was to respond to and obey the signals given by the engineer of the locomotive propelling any freight train to which he might be assigned; and, in so doing, to pass over the tops of the cars when in motion, in order to apply the brakes thereto attached whenever necessary to stop or check the speed of the said train. At an early hour (3:35 A. M.) of the 26th day of February, 1890, it being then dark and cloudy and stormy, one of the defendant company's freight trains, upon which the said E. T. Beard, deceased, was employed as a brakeman, was approaching from the west a station upon the said company's railroad called "Backbone," in Alleghany county, when the engineer in charge gave, in quick and rapid succession, certain alarm-whistle signals, which implied and were a command to the deceased to apply the brakes to that part of the train to which he had been assigned in order that the said train might be stopped and brought to a standstill as quickly as possible; when the deceased, responding to the signals so given him, proceeded to apply the brakes to his section of the train, and in so doing was obliged to pass, and did pass, over the tops of the cars from the front towards the rear end of the train. The brakes attached to sundry cars in his section of the train were in a worn, broken, and defective condition, and incapable,

Opinion.

when applied, of stopping the train as surely and quickly as they would have done had they been in good and effective working order. Owing to the defective and ineffective condition of the said brakes, the train, instead of being stopped, was carried, despite the brakes, with great speed and force under a low bridge spanning the railroad track, by collision with which the deceased, who was in the active and diligent discharge of his duty obeying the signal and command to apply the brakes, was knocked from the top of the car on which he was so engaged, thrown to the track beneath, run over by the train, crushed and killed. But for the worn, broken, and defective condition of the brakes aforesaid, the train, or that part of it on which the deceased was stationed, would have been stopped and brought to a standstill before reaching the bridge, and the plaintiff's intestate would not have been killed. His death was occasioned by the negligence of the defendant company in permitting the brakes on its cars aforesaid to become worn, broken, and inefficient, and in consequence of the said death the plaintiff was injured and damaged to the extent of \$10,000. The question presented for the determination of this court is whether the facts, distinctly and pointedly set forth in the declaration (which is admittedly faultless in form), entitled the plaintiff to maintain his action?

The *gravamen* of the action is the negligence of the defendant company, specifically charged in the declaration to consist in the non-performance of a legal duty owing by the defendant company to the plaintiff's intestate, by commission or omission, and the injury resulting to the plaintiff's intestate by the defendant company's non-performance of that duty. Patterson's R. R. Accident Law, 6-7.

It is averred in the declaration that there was a legal obligation resting upon the defendant company to provide and maintain safe, sound, and suitable brakes on the cars upon which Beard might be assigned to duty; and that it was in consideration of this obligation that the deceased went into the service

Opinion.

of the defendant company; that the defendant company was guilty of negligence and of the non-performance of its legal and contract duty in suffering the brakes attached to the cars of the train on which the deceased was employed on the night of his death, to become and be in such a worn and broken condition as to be incapable of stopping the train as quickly as otherwise they would have done; and that the death of the said Beard, plaintiff's intestate, directly resulted from this negligence and non-performance of duty on the defendant company's part. Every essential fact requisite to constitute actionable negligence, is distinctly charged in the declaration and admitted by the demurrer. Notwithstanding these positive and sufficient averments in the declaration, the circuit court sustained the demurrer and dismissed the plaintiff's suit.

The facts in the case of *Clark's Administrator v. R. & D. Railroad Company*, 78 Va. (Hansbrough), were wholly dissimilar from the facts of the case under review—the only point of resemblance being that in both cases the death of a brakeman was occasioned by collision with an overhead bridge. It was held in *Clark's Case* that his negligence in failing to observe the bridge under which the train had to pass upon a moonlight night, and his failure to stoop down and avoid the collision, when there was no occasion or necessity for standing in an upright posture while coming to and passing under the bridge, were the proximate cause of his death; and that the bridge was a peril, incident to the employment, contemplated by the contract, the open, obvious, and dangerous character of which the deceased had an opportunity to ascertain, and the risk of which he assumed; and it did not appear that he was, at the time that he was struck and killed by the bridge, engaged or engrossed in the active discharge of any duty or requirement which prevented or hindered the exercise of his mental and bodily caution.

In this case Beard is alleged in the declaration to have been struck and thrown from his train and killed by an overhead

Opinion.

bridge which he could not see, on a dark night, and because his back was turned towards the bridge and his mind and body actively engaged in the effort to apply the brakes and stop the train before it reached the bridge in obedience to the rapidly repeated alarm-whistle signals given by the engineer. He had the right to assume that the brakes, when applied, would stop the train before it reached the bridge; and it is expressly averred in the declaration that they were out of order, worn, and inefficient, and that they would have stopped the train and have saved the life of the deceased, if they had been in due order; that he was ignorant of the inefficiency of the brakes; and that the negligence of the defendant company in failing to keep the brakes upon its cars in safe condition, was the proximate cause of the death of the deceased. "The duty of inspection is affirmative, and must be continuously and positively performed." *Goodman v. R. & D. R. R. Company*, 81 Va. (Hansbrough), 586.

In the case at bar, the brakeman Beard, did not, by his contract of service, assume the risk of injury caused by defective machinery which it was the duty of the defendant company to keep in good repair, of the broken condition of which, it is averred, he was ignorant, and which he had a right to assume had been duly inspected.

The circuit court of Alleghany erred in sustaining the demurrer and dismissing the plaintiff's suit; and our decree is to reverse the judgment complained of and to remand the case with instructions to the circuit court to overrule the demurrer, and try the case upon its merits.

LACY, J., dissented.

JUDGMENT REVERSED.

Richmond.

ALLEN v. COMMONWEALTH.

DECEMBER 7th, 1893.

1. CRIMINAL PROCEEDINGS—*Recognizance—Scire facias*.—Condition of recognizance of one accused of a felony was for his personal appearance "to answer the charge against him." The language of the *scire facias* on such recognizance was for his personal appearance "to answer as of a felony whereof he stands accused": *Held*, (1) No form of language being prescribed for a recognizance it is sufficient; (2) the variance between the recognizance and the *scire facias* is immaterial.
2. *IDEM—Appearance and pleading*.—When recognizance provides that the accused shall appear, &c., and "not depart without the leave of the court"; *held*, no defence to *scire facias* that accused appeared and pleaded "not guilty" when he departed without leave of the court.

Error to judgment of the judge of the circuit court of Loudoun county refusing a writ of error to a judgment of the county court of said county, rendered at its December term, 1892, in a proceeding in the name of the Commonwealth of Virginia against Benjamin Allen and others on a *scire facias* issued from said county court on a recognizance of bail in a criminal case. Opinion states the case.

John M. Orr, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

HINTON, J., delivered the opinion of the court.

Opinion.

At the April term, 1892, of the county court of Loudoun county, Benjamin Allen, one of the appellants, was indicted along with Benjamin Allen, Jr., for a felonious assault upon one Johnson Furr.

At the September term of said court the said Benjamin Allen "appeared," as the record recites, in obedience to his recognizance and entered into a new recognizance in the sum of \$500, with Elizabeth Payne and John Allen, his sureties, in the like sum of \$500, conditioned for his personal appearance before the judge of this court on Friday next to answer the charge against him, and not to depart without the leave of the court," &c.

On the said Friday, September 16, 1892, he appeared, pleaded not guilty, the evidence was partly heard, and the case adjourned over to the next morning.

When the jury was brought into court on the 17th day of September, 1892, the prisoner failed to appear; whereupon a *scire facias* issued against the said Benjamin Allen and his sureties, returnable to the first day of the next term of the court.

On the 10th day of October, 1892, this *scire facias* was, on motion of the defendants, quashed, and the *scire facias*, which is assailed in this case, issued.

This *scire facias* is in the usual form, and states the conditions of the recognizance to be "that if the said Benjamin Allen should personally appear before the judge of the county court for the said county, at the court-house thereof on Friday, September 16, 1892, to answer as of a felony, whereof he stands accused, and should not depart without the leave of the said court, then the said recognizance was to be void."

At the December term the defendants demurred to the *scire facias*, pleaded *nul tiel* record, and answered. Each of these contentions having been determined against them, they obtained a writ of error to this court, and urge the same objections here.

Opinion.

Now was the recognizance of September 13, 1892, insufficient and void? We think not. The record would perhaps have been more formal had it stated that the condition of the recognizance was that the defendant, Benjamin Allen, should appear before, &c., "to answer the felony whereof he stands charged," instead of "to answer the charge against him." But the difference is not material. The Code, 1887, sec. 4093, has prescribed no set form of words to be adopted when the parties are recognized in open court, and section 4100 specially enacts that "no action or judgment on a recognizance shall be defeated or arrested by any defect in the form of the recognizance if it appears to have been taken by a court or officer authorized to take it and be substantially sufficient. The language of the Code is: "The condition, when it is taken of a person charged with a criminal offence, shall be, that he appear before the court, judge, or justice before whom the proceeding on such charge will be, at such time as may be prescribed by the court or officer taking it, to answer for the offence with which such person is charged * * * ; and * * * shall not depart thence without the leave of the court." Here the language of the order of the court, for in practice the recognizance is not usually written out in full when it is merely a renewal recognizance taken during the term of the court, while certainly general, is sufficiently definite, as it points to the only offence with which the prisoner stood charged. *Archer v. Com.*, 10 Gratt., 627; *Bolanz et als. v. Com.*, 24 Gratt., 31.

These observations will also dispose of the next assignment of error that there was no such record. The variance between the language of the recognizance and the *scire facias* must be regarded as immaterial.

The third and last assignment of error is the prisoner fulfilled the condition of the recognizance by merely appearing and pleading, and that the recognizance was thenceforth void and of no effect. But this has so often been decided the other

Opinion.

way that it cannot be necessary to do more than to cite some of the adjudged cases where the subject is fully discussed. *Com. v. Ross*, 6 Serg. & Rawle, 427; *Dennard & Alexander v. State of Georgia*, 2 Ga. Rep., 188; *Com. v. Teevens*, 143 Mass., 211; *State v. Stout*, 6 Halstead, 133; *Glasgow v. State (Kansas)*, 21 Pacific Reporter, 253. The provision in the recognizance that he shall not depart thence without leave of the court is inserted for the express purpose of having the party forthcoming and ready to answer the charge there preferred against him, but any other information that may be exhibited against him before he receives his discharge, and from this liability he cannot discharge himself and his sureties by any mere act of his own.

We see no error in the judgment of the county court of Loudoun, and the same is affirmed.

FAUNTLEROY, J., dissented.

JUDGMENT AFFIRMED.

Richmond.

CLARK v. COMMONWEALTH.

DECEMBER 7th, 1893.

1. **MANSLAUGHTER—Self-defence—Case at bar.**—Upon the facts in this case as set out in the opinion of the court, *held*, there is no element of self-defence in it, and the verdict of guilty of manslaughter with five years' confinement in the penitentiary, will not be disturbed.
2. **CRIMINAL PROCEEDINGS—Jury from another county.**—Where a *venire facias* is directed to sheriff of another county to summon a jury, a list need not be furnished him. Code, § 4024.
3. **IDEM—Bill of exceptions.**—An entry in the order book that defendant excepted to a certain ruling of the trial court will not supply the place of a bill of exceptions.
4. **IDEM—Instructions.**—At the trial the court instructs that "if the jury, from the evidence, believe that prisoner wilfully inflicted upon deceased a wound calculated to endanger or destroy life, and that death ensued therefrom within a year and a day, the prisoner is none the less responsible for the result, although it may appear that the deceased might have recovered but for the aggravation of the wound by unskilful or improper treatment." **HELD:** No error.
5. **IDEM—Witnesses.**—Commonwealth need not call all the witnesses present at the homicide or named in the indictment. But the court, of its own volition, may call such witnesses for cross-examination by both sides, and they will not be considered as witnesses for either. *Hill's case*, 88 Va., 633.
6. **MANSLAUGHTER—Self-defence.**—Where death ensues on sudden provocation or quarrel, without malice aforethought, the killing is manslaughter. To reduce the offence to killing in self-defence the accused must prove two things, to wit: (1) That before the mortal blow was given he declined further combat, and retreated as far as he could with safety, and (2) that he killed the deceased through the necessity of preserving his life or to save himself from great bodily harm. *Vaiden's case*, 12 Gratt., 717.

Statement—Opinion.

Error to judgment of corporation court of city of Danville, rendered February 20, 1893, upon a verdict of the jury of guilty of manslaughter in the trial of an indictment against one J. T. Clark for the murder of J. R. Moffett, sentencing him to confinement for the period of five years in the State penitentiary. To this judgment the prisoner obtained a writ of error and *supersedeas*. Opinion states the case.

Berkeley & Harrison, Peatross & Harris, and J. T. Harrison, for prisoner.

Attorney-General R. Taylor Scott and William R. Aylett, for commonwealth.

LEWIS, P., delivered the opinion of the court.

1. The first point made in the petition for the writ of error, and insisted upon in the argument here, is that the jury that tried the prisoner was not a lawful jury.

One of the grounds of this objection is that, after an unsuccessful attempt had been made to obtain a jury in Danville the court ordered a *venire*, to be directed to the sergeant of Lynchburg, commanding him to summon twenty-four persons from that city, which was done, but that no list was furnished of the names of persons to be summoned. It is contended that such a list ought to have been furnished, and the same point was made before the jury was sworn. The trial court, however, overruled the objection, and in this there was no error. Authority to direct jurors in a felony case to be summoned from another county or corporation than that in which the trial is to be had, is conferred by section 4024 of the Code, and there is no requirement that a list in such a case shall be furnished. Sections 4018 and 4019 apply only to the summoning of jurors from the county or corporation in which the trial is to be had; and the reason, no doubt, of the dif-

Opinion.

ference between those sections and section 4024, in respect to furnishing a list, is that in the former case the court or judge is presumed to have the means and information essential to intelligent action in the matter, but not so in the latter case. At all events, there is nothing in the statute to support the prisoner's contention, and we cannot, without assuming legislative authority, interpolate into the statute a requirement which the legislature has not seen fit to insert in it.

Objection is also made to the exclusion from the panel of Hirsh and Vernon after they had been sworn on their *voir dire* and accepted as qualified jurors. As to this matter, the transcript recites that after Hirsh and Vernon had been thus accepted, the attorney for the commonwealth moved to be allowed to re-examine them on oath as to their fitness to serve as jurors, and to introduce witnesses to prove that Vernon had on one or more occasions, after the death of the deceased, said the prisoner ought not to be convicted of the murder charged; "*which being done,*" it is further recited, "they were excluded from the panel, to which action of the court the prisoner, by counsel, excepted." No formal bill of exceptions, however, was tendered or signed, and the unauthorized entry by the clerk on the minutes or order book that the prisoner excepted, although the orders were signed, cannot supply the place of a bill of exceptions. Exceptions, to be of any avail, must not only be so drawn up as to distinctly present the ruling objected to, but they must be signed by the judge; and unless so authenticated they are no part of the record of the case. Code, sec. 3385; *Young v. Martin*, 8 Wall., 354; *Roanoke Land and Imp. Co. v. Karn & Hickson*, 80 Va., 589; *Fry v. Leslie*, 87 Id., 269; *Trumbo's Adm'r v. City Street Car Co.*, 89 Id., 780.

The point, therefore, is not presented by the record proper, and hence cannot be considered here. It is not improper, however, to say that were it regularly presented, we would have no hesitation in holding it to be without merit.

2. The next assignment of error is that the court misdi-

rected the jury. No reasons, however, are urged in support of this assignment; and it was virtually conceded in the argument at the bar that the action of the court in regard to the instructions was without error, as it unquestionably was.

The ninth instruction given for the commonwealth, and the only one we deem it necessary to specially mention or consider, is as follows:

“If the jury believe from the evidence that the prisoner wilfully inflicted upon the deceased a dangerous wound, one that was calculated to endanger and destroy life, and that death ensued therefrom within a year and a day, the prisoner is none the less responsible for the result, although it may appear that the deceased might have recovered but for the aggravation of the wound by unskilful or improper treatment.”

The prisoner shot the deceased in the abdomen, with a pistol, on the street in Danville, inflicting, according to the evidence for the commonwealth, a wound from which death ensued within less than thirty-six hours. An attempt was made on behalf of the prisoner to show that death was caused by improper surgical treatment; and it was to meet the evidence on this point that the instruction just quoted was given.

In *Commonwealth v. M'Pike*, 3 Cush., 181, it was laid down that where a surgical operation is performed in a proper manner, and under circumstances which render it necessary, in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of death, the party inflicting the wound will, nevertheless, be responsible for the consequences; and such is the settled law.

Lord Hale says: “If a man give another a stroke, which it may be is not in itself so mortal but that with good care he might be cured, yet if he die of the wound within the year and day, it is homicide or murder, as the case is, and so it hath been always ruled. * * * If a man

Opinion.

receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it were not the immediate cause of his death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causans*." 1 Hale, P. C., 428.

To the same effect is *Commonwealth v. Hackett*, 2 Allen (Mass.), 136, where, after a review of the authorities, the court, speaking by Chief Justice Bigelow, declared the rule to be that if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offence of murder or manslaughter, as the case may be, and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound. "A different doctrine," it was added, "would tend to give immunity to crime, and to take away from human life a salutary and essential safeguard." See, also, *Commonwealth v. Green*, 1 Ashm., 289; *State v. Bentley*, 44 Conn., 537; S. C., 26 Am. Rep., 486; *State v. Morphy*, 33 Iowa, 270; S. C., 23 Am. Rep., 122.

In the case in 44 Conn. the deceased was shot in the arm, and died eleven days thereafter of lockjaw. The prosecution claimed that death resulted from the wound; the accused that it resulted from the treatment of the case by the attending physicians. The wound was dressed in the first instance by one surgeon, and afterwards to the time of death by another. These differed radically as to the manner in which

Opinion.

the case should have been treated. The accused was convicted of manslaughter, and the conviction was held good. "There is no such defect in the law," it was said, "as that the person who intentionally inflicts a wound calculated to destroy life, and from which death ensues, can throw responsibility for the act upon either the carelessness or the ignorance of his victim, or shield himself behind the doubt which disagreeing doctors may raise as to the treatment proper for the case."

In conformity with these authorities, Greenleaf lays it down that "if death ensues from a wound given in malice, but not in its nature moral, but which, being neglected or mismanaged, the party died, this will not excuse the prisoner who gave it, but he will be held guilty of the murder, unless he can make it clearly and certainly appear that the maltreatment of the wound, or the medicine administered to the patient, or his own misconduct, and not the wound itself, was the sole cause of his death; for if the wound had not been given the party had not died." 3 Greenl. Ev., sec. 139.

3. The law, then, having been correctly propounded to the jury, the remaining question is, whether the verdict was warranted by the evidence, upon which question, it is important to observe, the prisoner occupies in this court the unfavorable position of a demurrant to evidence, the evidence, not the facts, being certified. That is to say, he must be considered as admitting the truth of the commonwealth's evidence and all just inferences which the jury could have properly drawn therefrom, and as waiving all his own evidence in conflict therewith, and all inferences from his own evidence which do not necessarily result therefrom; and unless, when viewed in this light, the verdict be plainly wrong, it is our duty to affirm it. Code, sec. 3484, Acts 1891-'92, p. 962; *Read's Case*, 22 Gratt., 924; *Gravelly's Case*, 86 Va., 396; *Gaines' Case*, 88 *Id.*, 682.

The evidence in the case is voluminous, but its salient points may be briefly stated. The deceased was a Baptist preacher

Opinion.

and an ardent Prohibitionist. He was also the editor of a paper called "Anti-Liquor." The prisoner was a lawyer and an ardent Democrat. Both were men in the prime of life. During the progress of the presidential election, on the 8th of November, 1892, both were actively engaged at the polls, when the prisoner accused the deceased of attempting to perpetrate a fraud by having bogus Democratic tickets printed. At this the deceased struck the prisoner a blow, and both were afterwards fined. Two days thereafter the deceased published a card in his paper relative to the disturbance on election day, in which he spoke of the prisoner as a "contemptible whiskeyte," and also as "a one-horse lawyer" who had been doing the dirty work of the liquorites for two years, and who, during a wet and dry campaign, had proposed to the liquor men "to buy a lot, and settle a nigger on it, next to Mr. Moffett," the deceased.

The prisoner was absent from Danville at the time of this publication, and did not return until the evening of the next day, when he was informed of it. The day before the publication, however (*i. e.*, the day or the evening after the election), in conversation with several gentlemen on the street relative to his difficulty with the deceased, he declared his purpose to "get even with him," and that they both could not live in the same town twenty-four hours longer; and within less than three hours before the shooting, he declared, in the presence of several witnesses, who testified for the commonwealth, that the deceased would have to leave town, and that the quicker he left the better it would be for him.

It appears that just before the shooting, and soon after being informed of the above mentioned publication, the prisoner went into the office of the Danville *Register* in search of a copy of the paper. When he reached the office, observing the deceased in conversation, standing with his back to the door, he turned and went out. This was between 8:30 and 9 o'clock in the evening. Upon coming out of the Register building he

Opinion.

walked up the street, and in a little while the deceased came out and walked up the same street. In a few minutes they met, when the prisoner shot and mortally wounded the deceased. The latter, in his dying declaration, said: "I left the *Register* office and walked up Main street. I met a man approaching me. He seemed to be coming straight, so I stepped aside to give him room. He was four or five yards from me when he commenced firing on me. I endeavored to secure his weapon, but was not successful in doing so until Mr. Green Williams, chief of police, came up and separated us." His assailant, he said, was the prisoner, though he did not recognize him until he commenced firing; and in answer to questions he further stated that he had no pistol, and that he made no assault on the prisoner before the firing commenced.

There were four shots fired, and upon examination of the prisoner's pistol, after the parties were separated, four of its five chambers were found to be empty. The fifth contained a loaded shell. The prisoner was shot in the wrist, and he declared the deceased had shot him. This the deceased denied. He also denied that he had a pistol, and requested the officer to search him, which the officer then and there did, without finding any. The prisoner, it seems, had been in the habit of carrying a pistol for a number of years.

Now, if this evidence stood alone, the jury would have been warranted in finding the prisoner guilty of murder. But there was evidence tending to show that the parties were engaged in a mutual combat before any of the shots were fired; and the jury were no doubt influenced by this evidence in finding the prisoner guilty of manslaughter only. The testimony of two of the witnesses, viz: Green Williams, the officer just mentioned, and one Gravely, is very positive on this point. Both claim to have been eye witnesses of the shooting, and the name of Williams was among those at the foot of the indictment. Accordingly, at the trial, the prisoner moved that these witnesses be called for the prosecution, but the court

refused to grant the motion. It did, however, put them on the stand, with liberty to both sides to cross-examine them, which was done; and it is now contended for the prisoner that their testimony is commonwealth's evidence, but this position is untenable.

According to *Hill's Case*, 88 Va., 633, the prosecution is not bound to call all or any of the witnesses present at the transaction in cases of homicide, as in England, but it is for the representative of the commonwealth to say what witnesses he will call; and this discretion ought not to be interfered with. The trial judge, however, may, in his discretion, call any witness who was present at the transaction, or whose name is on the indictment, for cross-examination by both sides; but, as was said in *Hill's Case*, a witness so called is not the witness of either party. Consequently, when the case is brought to the appellate court on a certificate of evidence, the evidence of such a witness, so far as it conflicts with the commonwealth's evidence, is not to be considered, since the accused, in such a case, according to the rule of a demurrer to evidence, admits the truth of the commonwealth's evidence, and all reasonable inferences that the jury could have drawn therefrom.

The point, however, is not a very material one in the present case, because the jury found the accused guilty of manslaughter; and if we were to consider all the evidence in the record, the result would be the same.

It is a principle of criminal law that where death ensues on a sudden provocation, or sudden quarrel, without malice prepense, the killing is manslaughter, and in order to reduce the offence to killing in self-defence, the accused must prove two things, viz: (1.) That before the mortal blow was given, he declined further combat, and retreated as far as he could with safety; and (2) that he killed the deceased through the necessity of preserving his own life, or that there was reasonable ground to believe that the killing was necessary to pre-

Opinion.

serve his own life, or to save himself from great bodily harm; which has not been shown in the present case.

In *Vaiden's Case*, 12 Gratt., 717, it was held that to make out a case of self-defence in a case of homicide, the accused must show to the jury that the defence was necessary to protect his own life, or to protect himself against grievous bodily harm; and that with regard to the necessity that will justify the slaying of another in self-defence, the accused must not have wrongfully occasioned the necessity, for a man shall not in any case justify the killing of another by a pretense of necessity, unless he were without fault in bringing that necessity upon himself. See, also, *Bristow's Case*, 15 Gratt., 634; *Lewis' Case*, 78 Va., 732; *Honesty's Case*, 18 Id., 283, 298; *Brown's Case*, 86 Id., 466, 470; *Gaines' Case*, 88 Id., 682, 693.

The prisoner in the present case was examined as a witness, and testified that when he met the deceased, the latter caught him by the coat and pushed him back several steps, at the same time drawing a pistol from his hip pocket; that he (the prisoner) knocked his hand down, and then drew his own pistol and fired. But the statement that the deceased had a pistol is positively disproven. He denied it in his dying declaration, as he had previously done, in the presence of the prisoner, immediately after the shooting; and when, at his request, he was searched by the police officer, no pistol was to be found. It is clear from the record that he had no pistol, and that the prisoner's statement on the subject was fabricated. In short, there is no element of self-defence in the case; and the judgment must be affirmed.

JUDGMENT AFFIRMED.

Richmond.

MORRISS v. VIRGINIA STATE INSURANCE CO.

Absent, Richardson and Hinton, JJ.

DECEMBER 7th, 1893.

1. **TRUST DEED—Notice of sale—Equity jurisdiction.**—Where a court of equity has taken charge of the execution of a trust, it should prescribe a reasonable notice of at least thirty days for sale of the trust property, notwithstanding the fact that the deed required "ten days at the least." Code 1873, ch. 113, § 6.
2. **IDEM—Place of sale.**—Where sale shall be made lies in the trustee's discretion in case the deed does not name the place; but if either party disapproves his decision, he should, before the sale, apply to the court for instructions. *Shurtz v. Johnson*, 28 Gratt., 657.
3. **IDEM—Case at bar.**—Where property on outskirts of Richmond was to be sold under a trust deed naming no place of sale, trustee selected the city hall, to which the debtor objected, that it would sell higher on the premises; *held*, the debtor's wishes should govern.
4. **IDEM—Sale in parcels—Injunction.**—Deed not prescribing sale by parcels must be construed by the statute requiring, in case of default, the trustee "to sell the property conveyed by the deed, or so much thereof as may be necessary." *Held*, if it will sell higher by parcels, and the owner requests such sale, and trustee refuses, a court of equity will intervene. *Terry v. Fitzgerald*, 32 Gratt., 851.
5. **IDEM—Personal confidence.**—The trustee must act in person, and not by agent. *Harvey v. Steptoe*, 17 Gratt., 289.

Appeal from two decrees of the chancery court of city of Richmond, rendered October 31, 1893, in the suit entitled "*Morriess, &c. v. The Virginia State Insurance Company*," and in the suit entitled "*Morriess, &c. v. James Alfred Jones, Trus-*

Statement—Opinion.

tee, &c.," heard together. The said Morriss obtained an injunction to a sale advertised by said trustee, and appealed from the decree dissolving said injunction. Opinion states the case.

Stiles & Holladay and Edmund Waddill, for appellants.

Christian & Christian, for appellees.

LACY, J., delivered the opinion of the court.

The controversy between the parties to this appeal has arisen over the execution of a trust deed executed by the appellants to a certain trustee, conveying a tract of land in Henrico county, near the city of Richmond, containing 856 acres, to secure a debt due the Virginia State Insurance Company of \$12,229 37. There were several abortive attempts at a sale, one on the premises, and another in the city of Richmond, when a sale was made at \$12,000, when, it appearing by affidavits that the price of \$12,000 was grossly inadequate, and in the opinion of numerous persons—real estate dealers and others—that the property was worth \$25,000, by consent of all parties the sale was set aside by the court, and a resale ordered. The trustee advertised the sale to take place at the door of the city hall in the city of Richmond, when the appellants procured an injunction, upon the ground that the property could not safely be sold in the city of Richmond with a reasonable expectation that it would bring a reasonable price, and that such a sale would result only in a sacrifice of the property; that it was a large farm near the city, situated in the county, and capable of subdivision into several valuable truck farms; that the trustee should not be allowed to sell the whole tract unless necessary to pay the debt due on it; that, if sold in bulk, it would not bring its value, whereas the record showed that it was worth \$25,000, and that land just across the road had recently sold for \$100 per acre, and this, by proper adver-

Opinion.

tisement and judicious offering, might be sold as well; that the ten days' notice required by the deed had not been given; that the advertisement was inserted on Sunday, the 4th, to take place on the 15th instant; that this was not a compliance with the terms of the deed in letter or in "spirit"; and that the advertisement contains no notice of the terms of sale as to the residue after the cash payment has been paid and the debt discharged. This bill was answered, and a motion made to dissolve the injunction. Upon the hearing the court dissolved the injunction by decree in the cause on the 18th of October, 1892, but reserved all other questions, and, on motion of the plaintiffs, suspended the decree upon the usual terms for ten days, to allow the plaintiffs to present their petition to this court for an appeal, which being done, the appeal was allowed.

In the first place, it appears that the advertisement was as long as the terms of the deed required—"ten days at the least."

The next question is as to the place of sale, and upon this question we will remark that the deed contained no stipulation as to the place where the sale should be made; and according to the rule established by the law, and to be found in the decisions of this court, this matter was left to the sound discretion of the trustee. *Shurtz v. Johnson*, 28 Gratt., 657, and cases cited; *Walker v. Beauchler*, 27 Gratt., 511, and cases cited. Mr. Barton says on this subject (2 Bart. Ch. Pr., 446): "When the deed does not fix the place for the sale, the trustee may make it in any place which, in discretion, he may select; but he should exercise that discretion fairly and prudently," (citing *Shurtz v. Johnson*, *supra*); and he cannot sell more of the trust subject than is necessary to satisfy the debt, unless the interest of the owners demand it, or they request it, or unless it would be injurious not to sell the whole. This rule, of course, relates to a divisible subject, the trustee's duty in every case being to act for the best interest of all the parties. It is a settled principle in this court that trustees ought not to

Opinion.

allow any urgency of the creditor to have an influence on their conduct, but that, whether they act under deeds of trust or under decrees of a court of chancery, they ought to consider themselves as impartial agents of both parties, and should act for the interest of the debtor as well as of the creditor. *Quarles v. Lacy*, 4 Munf., 251. And it is now incontrovertibly settled that a trustee is to be considered as the agent of both parties, bound to act impartially, and to disregard the suggestions of either inconsistent with that obligation, and that he has, in general, no greater powers touching his trust than a commissioner of a court of equity for a sale of lands under its decree. *Lane v. Tidball*, Gilmer, 130; 4 Minor Inst., 65; *Chowning v. Cox*, 1 Rand. (Va.), 311; 2 Minor Inst., 285; 1 Lomax Dig. 424. Mr. Barton says (2 Minor Inst., 286): "The general principle of his duty is to act justly, impartially, and discreetly, without permitting himself to be swayed to the one side or the other by the suggestions or persuasions of either party. He has been likened in this respect to the commissioner of the court of equity. He must conform to the terms of the deed in respect to the time and manner of giving notice, and the time and manner of sale, as well as in all other particulars, and in all points when the deed is silent he must govern himself by the general rule to sell to the best advantage, and with an impartial regard to the rights and interests of both parties." It is a principle, also, of such transactions that the trustee is charged with a personal confidence, and must therefore act in person and not by agent. 1 Lomax Dig., 427; 1 Tuck. Comm., 108; *Harvey v. Steptoe*, 17 Gratt., 289. It is the trustee's duty to forbear to sell, and to ask the aid and instructions of a court of equity, in all cases where the amount of the debt is unliquidated or in good faith disputed, when any cloud rests upon the title, when a reasonable price cannot be obtained, or when, for any reason, a sale is likely to be accompanied by a sacrifice of the property, which, at the cost of some delay, may be obviated. 2 Minor

Opinion.

Inst., 287; 1 Tuck. Comm., 106; *Lane v. Tidball*, *supra*; *Wilkins v. Gordon*, 11 Leigh, 547; *Miller v. Argyle*, 5 Leigh, 460; *Miller v. Trevilian*, 2 Rob. (Va.), 25; *Bryan v. Stump*, 8 Gratt., 247. Judge Lomax, in his Digest (volume 1, p. 425), says: "These trustees, may, of their own motion, apply to a court of equity to remove impediments in the way of a fair execution of their trust," and, if the trustee fails to do so, the debtor may enjoin the sale, and ask the execution of the trust under and by the aid of a court of equity, and thus, to adopt the language of Lord Bacon, substitute for the private conscience of the trustee "the general conscience of the realm, which is chancery," which Justice Story says implies nothing more than that a trustee who does not know his duty shall be at the pains to learn it.

As we have said, the deed is without directions as to the place where the sale shall be made, and the trustee must, in the exercise of a sound discretion, such as we have above referred to, select the place; and, if he shall be in doubt, he may apply to a court of equity for a determination of that question. If he determines for himself, and either party is not satisfied with his decision, he may apply to the court of equity to have it determined before the sale by the court, according to the circumstances of the case. That this question is determinable in the light of the circumstances of the particular case is clear under the decisions. In *Walker v. Beauchler*, *supra*, Judge Staples, speaking for the unanimous court, said: "It is very true the deed does not prescribe the place of sale, and much was therefore left to the discretion of the trustee. In the exercise of that discretion, it would seem clear that the sale ought certainly to have been made at least in the county where the property was situated." And the subsequent case of *Shurtz v. Johnson*, *supra*, Judge Burks says, speaking of a sale of land situated in York county, Va.: "It thus appears that neither Baltimore nor any other place is specially designated in the deed as the place where the sale is to be made, but by

Opinion.

the plainest implication the selection of such place is left to the discretion of the trustee, as is usual in deeds of this character. It may not be doubted, therefore, that the trustee had the power under the deed to make the sale at Baltimore, or at any other place which he, in his discretion, might select. The real and only question is whether he exercised that power fairly and prudently; in other words, whether he committed a breach of trust." Both of these two last-named cases were brought to invalidate the sale after it had been made. In the first the sale was set aside, and in the latter the sale was sustained. And, after the sale had been made, the court interposes with more reluctance than when it is applied to in the first instance, and before the sale is actually made. *Taylor v. King*, 6 Munf., 366; *Harris v. Harris*, Id., 368; *Gibson v. Jones*, 5 Leigh, 370; *Hughes v. Caldwell*, 11 Leigh, 348. In this case the trustee, in the exercise of his discretion, selected the place of sale outside of the county. The debtors, who claim that they have a tract of land worth at least \$25,000, and a debt on it of \$12,000, object to the place selected by the trustee, and, before the sale is made, insist that it ought to be made on the premises; that the land is worth a good deal more than the debt on it; that it is capable of advantageous sub-division, and that it ought to be sold in parcels; that it is not necessary to sell the whole to satisfy the debt, and that only so much ought to be sold as is necessary to pay the debt on it; that its appearance and situation will increase the prospects of a good sale when the sale is made on the premises in view of the bidders. The trustee, in his notice, says: "There are few estates combining more elements of value than this. In the first place, it is a large estate, very near to the city of Richmond, on an excellent road, and embracing some of the finest trucking land in the county, the soil being similar to that of the noted vegetable section of Hanover county; then, again, its nearness to a growing city, such as Richmond now is, justifies the hope of a very largely increased value in a few years; and, again, it is

Opinion.

said to contain inexhaustible quantities of the finest clay for pottery, fire brick, tiling, etc.”; and besides, he says, “embracing, besides the excellent highland, a quantity of Chickahominy low grounds and a sufficiency of woodland.” In view of the fact that such large interests are involved, the property being both extensive and valuable, and the debt being safely secured and bearing 7 per cent interest, in reviewing the discretion of the trustee, and considering all the circumstances of the case, we are of opinion that the wishes of the debtor in this case ought to be so far respected as to make the sale on the premises, the deed not prescribing any other place, and that, before dissolving the injunction, the chancery court ought to have so directed, and its refusal to do so is error, for which the decree complained of must be reversed and annulled.

We are further of opinion that the land should be subdivided and sold in parcels; that no more may be sold than is necessary to pay the debt; and, when enough has been realized to pay the debt, no more ought to be sold. It is true that the deed simply directs the trustee to sell the property conveyed, but this must be taken in connection with the statute, chapter 113, § 6, Code 1873, which applies to this case, which provides, in such case, that when default shall have been made in the payment of the debt, or any part thereof, by the grantor, the trustee shall sell the property conveyed by the deed *or so much thereof as may be necessary*. And Judge Moncure, speaking of this subject, and construing a similar law to this, says, in *Michie v. Jeffries*, 21 Gratt., 347: “It is the duty of the trustee not to sell more of the trust subject than the purposes of the trust require, even though the deed direct him, in case of default, to sell the trust subject, without saying, ‘or so much thereof as may be necessary to satisfy the purposes of the trust,’” the last part of the sentence, “to satisfy the purposes of the trust,” being the phraseology of the law applicable to that case. Code 1860, c. 117, § 6. He adds: “That is always implied, unless a contrary intention plainly appears”; and

Opinion.

again: "In saying 'under and by virtue of the trust deed,' the tract of land thereby conveyed to him is to be construed and read as if the words 'or so much thereof as may be necessary' followed the words above mentioned. In saying 'under and by virtue of the trust deed,' all the terms of the deed, and of the law on which it is founded, are in effect embodied in the decree, except such as are expressly varied." To the same effect is *Terry v. Fitzgerald*, 32 Gratt., 851; the opinion in that case saying: "We hold that it was the duty of the trustee to sell it in parcels, if by that mode it would bring the best price; and, although he has a discretion, it is a legal discretion, which is subject to the control of a court of equity; and if the land will bring a better price by dividing it and selling it in several lots, and the owner desires and requests it, and the trustee refuses, the owner thereby invokes the intervention and assistance of a court of equity, * * * to control him in the exercise of his discretion," citing Judge Moncure as saying, in *Crenshaw v. Seigfried*, 24 Gratt., 272: "If the debtor desires that a particular and designated portion of the land, fully adequate by a sale for cash to produce the amount of the debt and expenses, such desire ought to be carried into effect. In this case the debtor does not insist that only a part of the land shall be sold, or object to selling the whole if necessary for the payment of the debt and expenses, but only insists that it shall be laid off into particular and designated portions, having assurance that it will sell better, and will not require the sale of the whole to pay the debt and the expenses." In the same case it is said that the court having possession of the case ought, instead of dissolving the injunction, to have retained it, and directed the execution of the trust; and further, "the court is of opinion, therefore, that the circuit court, instead of dissolving the injunction, should have continued it, retaining the cause, and had the sale made under its supervision and direction." And we think that in this case the court ought not to have dissolved the injunction, but should have

Opinion.

retained the case, and directed the sale to be made under its supervision, directing a division into portions, and making a sale only of so much as was necessary to satisfy the debt; and its refusal so to do, and its action in dissolving the injunction, was error, for which, moreover, the decree of that court must be reversed and annulled.

As to the length of time that the land should be advertised before selling, the terms of the deed are not restrictive, except only so far as to prohibit a shorter notice than "ten days at the least," and in this case the court, in justice to the debtor, should prescribe a reasonable notice of at least thirty days, and not only in the newspaper as directed by the deed, but by handbills posted and so distributed as to bring the best price attainable for the property, if these expenses are incurred at the instance and request of the debtor, as they do not diminish the amount to be received by the creditor, and in no way impair his rights. It is right to add that in this case the creditor has been liberal and not unduly aggressive in enforcing his claim. It appears that he has been as anxious as the debtor to make the property bring the best price possible, and there is no proper criticism that can be, or ought to be, made upon him, nor upon the trustee throughout these transactions. Much has been done in a mutual spirit of friendliness; but the parties have reached the point where divergence of interest has finally culminated in disagreement, and, the debtor seeking the aid of a court of equity, as he had a right to do, we have considered the rights of the parties as they now appear, and will reverse the decree for the stated reasons, and remand the cause to the chancery court, with directions to continue the injunction, and direct the proceedings of the trustee in order to a sale of the property and the payment of the creditor's debt as soon as it can be done, having regard to the just rights of all concerned.

FAUNTLEROY, J., concurred in the result.

Dissenting Opinion.

LEWIS, P., dissenting, said :

The case, in my judgment, is so plain for affirmance that I shall be brief in the statement of my views in regard to it. In view of the evidence in the record and the settled law on the subject, it is matter of surprise that the decree appealed from should be reversed. Fortunately, however, two of the judges being absent, the decision cannot be authority for any other case. *Whiting v. Town of West Point*, 88 Va., 905, 912.

Much that is said in the opinion just announced is not relevant to any question before the court. The case is a simple one. The principal grounds upon which the injunction was prayed for to prohibit the advertised sale were (1) that the sale ought to be made on the premises; (2) that the property ought to be sold in parcels; and (3) that the notice of sale was not sufficient, the latter point being now abandoned.

The property is situate just outside the city limits. The place of sale is not prescribed in the deed of trust, but the provision is that in the event of a sale, "the same shall be made after first advertising the time, place, and terms thereof for at least ten days in some newspaper published in the city of Richmond," and the statute provides that the trustee in a deed of trust, which does not otherwise provide, shall, when called upon to sell, make sale after having first given "reasonable notice of the time and place of sale," which, of course, implies that in such a case the sale need not be upon the premises, but that it may be at any other suitable place the trustee, in his discretion, may select. Code, sec. 2442; 1 Bart. Ch. Pr., 446.

The principle is that the trustee must exercise his discretion, so far as he has any, in an intelligent and reasonable manner. He must use every effort to sell the estate under every possible advantage of time, *place*, and publicity. 2 Perry, Trusts, sec. 602o.

This elementary principle was recognized by the Supreme Court of the United States in *Richards v. Holmes*, 18 How.,

Dissenting Opinion.

143. There the trustee in a deed of trust, having advertised the sale to take place on the premises, adjourned the sale to a different time and place, and this action was approved. The court, speaking by Mr. Justice Curtis, said: "We consider that a power to a trustee to sell at public auction, after a certain public notice of the time and place of sale, includes the power regularly to adjourn the sale to a different time and place, when, in his discretion fairly exercised, it shall seem to him necessary to do so in order to obtain the fair auction price for the property. If he has not this power, the elements or many unexpected occurrences may prevent an attendance of bidders, and cause an inevitable sacrifice of the property. It is a power which every prudent owner would exercise in his own behalf under the circumstances supposed, and which he may well be presumed to intend to confer on another."

The case of *Johnson v. Dorsey*, 7 Gill, 269, is another authority in point. In that case, under a decree of foreclosure of a mortgage, a farm, situate just outside the city of Baltimore, was ordered to be sold, and the sale which was made, not on the premises, but in the city, was upheld.

Indeed, in *Shurtz v. Johnson*, 28 Gratt., 657, a sale by a trustee in Baltimore of a farm situate in York county, in this State, was sustained; and Judge Burks, in the course of his opinion, said: "I know of no law of this State forbidding such a sale, and no decision of any court has been cited in support of the general proposition, that a trustee who is invested with power to make sale of real estate for the payment of debts, without express limitation as to the place of sale, cannot lawfully make such sale at a place outside the territory and beyond the jurisdiction of the State in which such real estate may be. The powers of the trustee must be determined from an examination of the deed under which he acted. * * It appears that neither Baltimore nor any other place is specially designated in the deed as the place where the sale is

Dissenting Opinion.

to be made, but, by the plainest implication, the selection of such place is left to *the discretion of the trustee*, as is usual in deeds of this character."

The learned judge also referred to *Walker v. Beauchler*, 27 Gratt., 511, and pointed out the difference in the circumstances of the two cases, and that there was no conflict between the cases. Indeed, Judge Staples, speaking for the court in the *Walker Case*, expressly stated that where the place of sale is not prescribed by the deed of trust, much is left to the discretion of the trustee. He lays down no such proposition as that, in such a case, the sale must, as matter of law, be on the premises, or even in the county; neither does he impugn the general principle stated by Judge Burks in the *Shurtz Case*; but merely says that under the circumstances of the case with which he was dealing—the war being flagrant—the sale ought to have been at least in Alexandria county, where the property was situate, and not in Georgetown, outside the State. The case is, in fact, an authority for the principle that whether a trustee has fairly exercised his discretion depends upon the circumstances of the case—a principle universally recognized, not only in regard to selecting the place of sale, but also as to selling the estate in whole or in parcels.

Now, remarkable to say, the conclusive and uncontradicted evidence on this point in the present case is utterly ignored in the opinion just announced.

It is proven, as the opinion of competent judges, that the property will sell to better advantage in Richmond than on the premises. This is set out at large in the answers of the defendants, which were sworn to, and which were treated as affidavits on the motion to dissolve the injunction, there being no countervailing testimony. 1 Bart. Ch. Pr., 414; *Muller v. Stone*, 84 Va., 834. The answers aver that the premises are greatly out of repair, and by no means attractive in appearance. It is also stated that at a previous sale on the premises, under the deed of trust, the only *bidders* present were from the city; that

Dissenting Opinion.

the property, after extensive advertisement, was offered on that occasion both as a whole and in parcels, *and that several thousand dollars more were bid for it as a whole than in parcels.* Not enough, however, was bid either way to pay the secured debt, and the chancery court refused to confirm the sale. It is also averred that there is no reasonable ground to believe that the property will ever sell for the amount of the debt, which has greatly increased by the accumulation of interest.

The answer of the trustee states that he would have indulged the appellants as to the place of sale had they expressed a preference (as they were given the opportunity to do) for the sale again to be on the premises. He also says that in view of the fact that at the previous sale on the premises not more than a half dozen persons from the country attended, he considered the chance of an advantageous sale better if the property were offered in Richmond, and accordingly advertised the sale to take place in front of the city hall.

Why, then, should the advertised sale be enjoined instead of leaving the trustee to try the experiment of a sale in the city? Surely no one could have been injured by such experiment; for had the sale proceeded in the city without a just or satisfactory result, the chancellor could have refused to confirm it. The appellants thus had an ample remedy for the protection of their interests, without applying, as they did, to the judge of another court for an injunction to stop the sale. It is to the interest of all parties that the property shall bring the best possible price; and as it has once been offered on the premises without an adequate price being obtained, why should it not be offered in the city, where, according to the evidence, the chance of obtaining a fair price is better? It is extraordinary, as it seems to me, that the decree dissolving the injunction should be reversed, with arbitrary directions to sell on the premises and in parcels, in view of the result of the effort that has already been made to sell in that way and all the other evidence in the case.

Dissenting Opinion.

It is perfectly apparent from the record that the object of the appellants is to obtain delay, and in the meantime to remain in possession and enjoyment of the property. Their appeal, in my judgment, is wholly without merit, and it is to be regretted that it should find favor in a court of justice.

I am for affirming the decree.

DECREE REVERSED.

Richmond.

GASKINS v. FINKS.

JANUARY 11th, 1894.

POWERS—Executions—Case at bar.—Where husband devised his estate to his wife with power to dispose of it by will, *held*, she cannot execute the power by a conveyance during her lifetime, such conveyance being not merely such a defective attempt to execute the power as a court cannot aid and remedy, but in plain disregard of it.

Appeal from decree of circuit court of Culpeper county, rendered September 16, 1891, in the chancery cause of Gaskins v. Finks and others. The lower court dismissed the bill and the complainant appealed. Opinion states the case.

J. C. Gibson, for appellant.

Hill & Jeffries, for appellees.

LACY, J., delivered the opinion of the court.

The controversy in this case is within a narrow compass. William Hurt, by his will probated February 16, 1852, provided, among other things: "Secondly. I give and devise to my beloved wife, Maria Louise Hurt, the whole of my estate, real and personal, during her widowhood, with full power and authority to dispose of the same by her last will and testament in any manner she may think proper. Thirdly. In case my wife should marry again, it is my desire that my wife shall

Opinion.

only have such part of my estate as she would be entitled to by law in case I had died without making any will." Mrs. Hurt never married, and died in 1888, devising by her will the lands of William Hurt to the appellees in general terms. However, in 1867, she had during her life conveyed 16½ acres of this land to one Miller, and executed a penal bond to protect him against the defeat of his title thus acquired by her marriage or by her will. Miller conveyed to one Collins, who conveyed it to the appellant Gaskins. In August, 1889, the appellees brought ejectment for this land against Gaskins, who stayed the action of ejectment by bill of injunction. At the hearing, the circuit court sustained the demurrer of the defendant, and dismissed the bill, and the plaintiff appealed.

This decree is plainly right. Mrs. Hurt had a limited estate during her widowhood only, to which was added the power of appointment by will unrestricted. This power she could execute only according to its terms. The execution of the deed during her life was not a defective attempt to execute the power which the court can aid and remedy, but in plain disregard of it; and so understood by her and her vendee, as is shown by the penal bond executed at the time, intended to protect him in case of her failure to make the conveyance good by her will. *Freeman v. Eacho*, 79 Va., 43. In *Hood v. Haden*, 82 Va., 592, it is said: "Upon this point the law is very exact, and the cases uniformly hold that all the forms and conditions annexed to the exercise of a power must be strictly complied with. Thus, if a deed be required, the power cannot be executed by a will, and if a will be required, that mode alone will suffice." Citing *Doe v. Thorley*, 10 East, 438. There is no question better settled in the authorities, and the decree of the circuit court appealed from appears to be plainly right, and must be affirmed.

DECREE AFFIRMED.

Richmond.

SHIFLETT ET AL. V. COMMONWEALTH.

JANUARY 11th, 1894.

1. CRIMINAL PROCEEDINGS—*Misnomer—Amendment*.—Where defendants indicted jointly for a misdemeanor, have been duly summoned, but failed to appear, the court may, in their absence, amend the indictment against "S. C.," and make it read "S. S. *alias* S. C." Code, § 3999.
2. *IDEM—Absence—Imprisonment*.—Upon such indictment, *held*, not error to try defendants in their absence, without first awarding a *capias* for their arrest, nor to enter judgment for their imprisonment in jail (Code, § 4012 and § 4076); nor to order their arrest and imprisonment for non-payment of a fine before a *fiery facias* has been issued. Code, § 726.
3. CONSTITUTION—*Rights of accused*.—Such trial and sentence of such defendants in their absence, *held*, not violative of the constitutional guaranty that "the accused in all criminal prosecutions hath a right to be confronted with the witnesses against him."

Error to judgment of circuit court of Greene county, affirming a judgment of the county court of said county, rendered at its May term, 1892, upon the verdict of the jury at the trial of an indictment against one Scott Shiflett and others for disturbing religious worship. Opinion states the case.

Field & Thomas, for plaintiffs in error.

Attorney-General R. Taylor Scott, for commonwealth.

LEWIS, P., delivered the opinion of the court.

Opinion.

The plaintiffs in error were jointly indicted, under section 3805 of the Code, for a disturbance of religious worship. A summons to answer the indictment duly issued and was served upon them, but there was no appearance on the part of either of them. At the May term, 1892, the following order was entered in the case, viz:

"It appearing to the court that the indictment contains a misnomer in this, that Scott Shiflett is called Scott Crawford, by which last name he is commonly known, but his true name is Scott Shiflett, it is therefore ordered that the indictment be amended by striking out the name of Scott Crawford and in its place and stead inserting the name of Scott Shiflett *alias* Scott Crawford, which is accordingly done."

At the same term it was ordered as follows: "It appearing to the court that a summons has been executed on each of the said defendants ten days before the present term of this court, and the commonwealth being ready for trial, the court doth order that the trial proceed, though none of the defendants are present, in the same manner as though said defendants had appeared and pleaded not guilty.

The trial thereupon proceeded, and the jury found the defendants guilty, fixing their punishment at four months' imprisonment in jail and the payment of a fine of \$50 each, and there was judgment accordingly. And on motion of the attorney for the commonwealth a *capias* was awarded commanding the arrest of the defendants and their delivery to the jailor of Greene county, to be by him safely kept in jail for the term of four months, and thereafter until payment of the fine and costs adjudged, such additional confinement, however, not to exceed six months.

The judgment of the county court having been affirmed by the circuit court of Greene county as to the plaintiffs in error here, a writ of error was awarded by one of the judges of this court.

1. The first objection is to the action of the trial court in

Opinion.

allowing the indictment to be amended in the absence of the defendants. This objection, however, is without merit in view of the statute which provides that no indictment shall be abated for any misnomer of the accused, but that "the court may, in case of a misnomer appearing before or in the course of a trial, forthwith cause the indictment or accusation to be amended according to the fact." Code, sec. 3999.

The statute does not say the amendment shall be made only in the presence of the accused; and in the present case the amendment was not made until after the defendants had been summoned to answer the indictment, though we do not mean to say that the amendment might not have been rightly made before service of process. Upon that point it is unnecessary to express any opinion.

2. Nor was there error in proceeding to trial in the absence of the defendants. The argument is that inasmuch as corporal punishment is attached to the offence charged in the indictment, a *capias* ought to have been awarded for the arrest of the defendants, and that it was illegal to order a trial in their absence. But here, too, all doubt is removed by the statute, which reads as follows: "In prosecutions for misdemeanors, in cases not embraced by section 4010, after a summons has been executed ten days before the first day of the term of the court, or if the accused was admitted to bail and make default, the court may either award a *capias*, or proceed to trial, in the same manner as if the accused had appeared and pleaded not guilty." Code, sec. 4012.

3. The next objection, viz: that the trial court erred in entering up judgment in the absence of the defendants, is also settled by the statute, which, as respects misdemeanors, displaces the rule of the common law that judgment for corporal punishment can be pronounced against a man only when he is personally present. Section 4076 of the Code provides that "no *capias* to hear judgment shall be necessary in any prosecution for a misdemeanor, but" that "the court may proceed

Opinion.

to judgment in the absence of the accused; and" that "if such judgment requires confinement in jail, the court may make such order as may be necessary for the arrest of the person against whom such judgment is and for the execution thereof."

4. Another point is that "when the accused is not in custody it is error to direct his arrest and confinement in jail for the non-payment of a fine until a *fi. fa.* has been issued." But section 726 of the Code empowers the court in which any judgment for a fine is rendered, going in whole or in part to the commonwealth, either of its own motion, or at the instance of the attorney for the commonwealth, to commit the defendant to jail until the fine and costs are paid, or until the costs are paid, where there is no fine; and provides further that the court, or the judge thereof in vacation, may direct the clerk to issue a *capias pro fine* either before or after the return of a writ of *fi. fa.* Section 4071, however, provides that when a person is sentenced to confinement in jail a certain term, and afterwards until he pay a fine, &c., such additional confinement shall in no case exceed six months from the end of said term; and this provision was observed in the present case.

5. Lastly, the objection that the defendants have not been constitutionally tried is as destitute of merit as the assignments of error already considered. The constitutional guarantee that the accused in all criminal prosecutions hath a right to be confronted with the witnesses against him, &c., is in no manner violated by any of the statutory provisions above mentioned. The appellants in the present case were given the opportunity, as the statute requires, to appear and defend, and their choice not to appear, but to make default, was a waiver of the constitutional provision now relied on.

We are of opinion that the judgment of the circuit court is right and must be affirmed.

JUDGMENT AFFIRMED.

Richmond.

HECKERT v. HILE'S ADM'R.

JANUARY 11th, 1894.

Absent, Lewis, P., and Hinton, J.

1. LEGITIMACY—*Invalid marriage—Case at bar.*—Wife leaves her husband and goes to another State. He marries again, and has children born of the second marriage before the first is dissolved; *held*, those children are legitimate. Code, § 2554.
2. IDEM—*Cases compared.*—The case of *Greenhow v. James*, 80 Va., 636; *held*, not to overrule *Stones v. Keeling*, 5 Call, 143.

Argued at Staunton. Decided at Richmond.

Appeal from decree of circuit court of Rockingham county, rendered October 26, 1889, in two chancery causes, heard together, wherein C. Hartman was complainant and John M. Showalter's administrator was defendant in one, and John M. Showalter's administrator was complainant, and Peter Hile's administrator and others were defendants in the other. The decree being adverse to Margaret Heckert and others, they appealed. Opinion states the case.

John E. Roller, for appellants.

Sipe & Harris, for appellees.

LACY, J., delivered the opinion of the court.

Opinion.

The controversy in this case is between the children of Peter Hile by a lawful wife, who left her husband and went to the State of Michigan, and the children of said Peter Hile by another woman, married by him during the lifetime of his first wife, who were born before the dissolution of the marriage of the first wife. The circuit court decreed that the first marriage was lawful, and the children legitimate; that the second marriage was null, but that the children of this null marriage were legitimate—made so by our statute (section 2554 of the Code of Virginia), which declares that “the issue of marriages deemed null in law, or dissolved by a court, shall nevertheless be legitimate,” and that the second set of children, being legitimate, inherited from the father as the first set, the issue of the legal marriage. There can be no doubt of the correctness of this decision. The case comes within the plain provision of the statute cited above, which is of ancient date in this commonwealth (Acts 1785, c. 60; Acts 1794, c. 93, § 19), and was carefully considered and construed in 1804 in this court, in the case of *Stones v. Keeling*, 5 Call, 143—a decision under which we have since rested. In that case the law was considered in every aspect under which it should be regarded, and was sustained and made effective.

But it is contended by the counsel for the appellants that a recent case in this court has substantially overruled *Stones v. Keeling*, and they cite *Greenhow v. James' ex'or*, 80 Va., 636; but we do not so regard it. That was the case of the illegitimate children of a white person by a negro, who left the State, and were married abroad. The distinction is sufficiently drawn in the opinion in that case; and in the case of *Stones v. Keeling*, *supra*, Judge Roane, who delivered one of the opinions in that case, does the same on page 148, saying: “The law concerning marriages is to be construed and understood in relation to those persons only to whom that law relates, and not to a class of persons clearly not within the idea of the legislature when contemplating the subject of marriage and legiti-

Opinion.

macy." The case of *Greenhow v. James* does not affect this case, nor the case of *Stones v. Keeling*, and the last-named case is a distinct authority on this case, and we think upon the plain terms of the law, and the reason of the legislature in enacting the same, is correct. We therefore affirm the decree of the circuit court of Rockingham county appealed from here.

FAUNTLEROY, J., dissented. .

DECREE AFFIRMED.

Richmond.

NORFOLK & WESTERN R. R. Co. v. ADAMS, &c.

JANUARY 11th, 1894.

1. **CARRIERS**—*Detention of cars*—"Demurrage."—A railroad company may make a reasonable charge for delay in unloading cars after notice of arrival to the consignee, and such charge is not for transportation, storage or delivery of freight within Code, §§ 1202, 1203, which declare that no charge other than that provided by law shall be made.
2. **IDEM.**—A charge to a consignee of one dollar a day after three days for every car remaining unloaded after notice of arrival, *held*, not unreasonable.

Error to judgment of circuit court of Roanoke county, rendered at its April term, 1893, in an action of *assumpsit* wherein the defendants in error, Adams, Clement & Co., were plaintiffs, and the plaintiff in error, the Norfolk and Western Railroad Company, was defendant. The object of the suit was to recover \$488 with interest thereon from September 1, 1891, until paid, alleged to have been illegally exacted from and paid by the plaintiffs to said company as charges for the detention of freight cars consigned to them, beyond seventy-two hours after notice of arrival. It was a rule of the company with which the plaintiffs were acquainted, to charge one dollar a day for detention of cars beyond three days, and the shipments were made with the agreement that the rule should be enforced. The plaintiffs contended that the rule violated Code, sections 1202 and 1203, which regulate the charges of carriers of passengers and freight. The verdict and the judgment being for the amount claimed by the plaintiffs, the defendant

company brought the case here upon a writ of error. Opinion states the case.

Kirkpatrick & Blackford and Watts, Robertson & Robertson, for plaintiff in error.

Pugh & Moffett, for defendants in error.

FAUNTLEROY, J., delivered the opinion of the court.

The Norfolk and Western railroad is a common carrier owning and operating a line of railroad in the State of Virginia, and the town of Salem is upon the said line. The plaintiffs are lumber dealers, doing business at the said town of Salem; and between February 16th and August 31, 1891, they received a large number of shipments of lumber in car-load lots consigned to them from points on the line of the said Norfolk and Western railroad and from points in the State of Virginia and other points in other States. These shipments were made with the understanding and agreement that the lumber was to be unloaded by the consignee at Salem depot upon the arrival of the shipments at that point. The railroads of Virginia and of other States, for their own protection, as well as for the protection and benefit of the public, have a car service set of rules, designed and enforced to secure the prompt movement of freight cars; and under the rules of this car service association the Norfolk and Western Railroad Company have a charge of (\$1) one dollar per car per day for the use of their cars and their side or switch tracks, for every day that the cars remain unloaded after notice of their arrival to the consignee, and the lapse of three days. Under the abuses that prevailed previous to the establishment of this rule serious loss and inconvenience were caused both to the shipping public and the railroad company by the unreasonable and protracted delay of consignees in unloading the cars, the railroad company being unable

Opinion.

thereby to furnish cars when called upon by shippers of freight, and their side tracks being encumbered, and the movement of freight impeded, causing heavy expense and a demand for more track room to accommodate idle cars, standing unloaded upon their tracks, and the company unable, therefore, when called upon to furnish cars for the shipping public. The railroad company, as a common carrier, is bound to furnish cars for transportation of freight, and they must have control over their cars in order to perform their duties to the public. A car in motion is a useful thing, but a car standing idle and unloaded on the track is useless and an incumbrance. If A. be allowed to hold a car unloaded at his pleasure or convenience, without cost or charge, and thus deprive the railroad company of the use of its vehicles for transportation of the freight of B., it is evident that both the railroad company and the shipping public will suffer injury. The plaintiffs in this suit had notice of the existence and operation of these rules, and they had paid the charges for the detention of cars long before the commencement of the account sued upon, and they knew and agreed, when the shipments were made, that such a charge would be made unless they unloaded their cars in compliance with the rule of the company, which gave to them seventy-two hours in which to unload their freight, after notice of the arrival of the cars which they had stipulated to unload.

It is well settled, in this State and in other States, that a common carrier may make reasonable rules and regulations for the convenient transaction of business between itself and those dealing with it—either as passengers or as shippers. See *Norfolk & Western Railroad Company v. Wysor*, 82 Va. (Hansbrough), 250; *Norfolk & Western Railroad Company v. Irvine*, 84 Va. (Hansbrough), 553. That this rule is reasonable and proper and that the railroad company can make such a charge has been decided in a number of States—the question never having arisen before in this State. See *Miller & others v.*

Opinion.

Georgia Railroad & Banking Company, reported in *American & English Railroad Cases*, vol. 50, p. 70; *Miller v. Mansfield*, 112 Mass., 260; *Union Pacific, Denver & Gulf Railroad Company v. Cook*, *American & English R. R. Cases*, vol. 50, p. 89; *Kentucky Wagon Manufacturing Company v. Louisville & Nashville Railroad Company*, *Amer. & English Railroad Cases*, vol. 50, p. 90; *C. M. & St. Paul Railway Company v. Pioneer Fuel Company*; *Beach Railway Law*, sec. 924, and cases there cited; *Jones on Liens*, sec. 284, and cases cited; *Lawson's Rights & Remedies*, vol. 4, p. 3146, secs. 1831 and 1832; *Wood's Railway Laws*, pp. 1592-3 and 1600; *Waterman on the Law of Corporations*, vol. 2, pp. 245-6; *Amer. & English Ency. of Law*, vol. 2, pp. 878 to 881, and notes; *Redfield on the Law of Railways*, 6th edition, pp. 67 to 83.

In addition to this long line of authorities holding the right of a railroad company to make such charge, and the reasonableness of such charge, there have been numerous investigations and rulings upon the point by the railroad commissioners of the various States. In Texas the railroad commissioner, Judge Reagan, after full investigation, made an order fixing \$3 per day per car as a reasonable charge for delay in unloading after forty-eight hours notice. The railroad commissioner of Illinois, and those of other States, after full investigations, have decided in favor of the right and reasonableness of such a charge; and when it is considered that these railroad commissioners are appointed for the express purpose of regulating railroads in the interest of the public, the weight of their decisions as to the reasonableness of such a charge is apparent. It is contended, however, that the sections of the Code of Virginia, 1887, 1202 and 1203, make such a charge illegal; and the judge of the trial court took the view of the plaintiff, and instructed the jury that, under the law of Virginia, such charge is unlawful, whether it be reasonable or not.

Opinion.

We think that the trial court erred in so holding and in so instructing the jury. The charge made by the railroad company for the detention of its cars and the occupation of its tracks after due notice, and the allowance of three days to the consignees to unload the cars and disincumber the track is not within the purview purpose or prescription of the statute, and is not of the character of weighing, storage and delivery of articles of freight contemplated by the makers of the statute. The charge is not for transportation, storage or delivery of freight, and it is not a device or a pretext for exacting of the shipper or the consignee more than the rate prescribed by law and fixed by schedule; but it is for the use and occupation of the cars and the obstruction of their tracks by the consignee for weeks and months after the contract for transporting and delivering the freight had been fulfilled and ended. It is neither a transportation charge, nor a storage charge, nor a terminal charge, nor a subterfuge for adding to the cost of transportation in excess of the rates prescribed. After arrival at the place of consignment, and notice to the consignee of the arrival, and the allowance of a reasonable time for the unloading of the cars by the consignee, according to his contract obligation to unload, the duties and the liabilities of the carrier cease, and the carrier becomes simply a bailee for him, and can make rules and regulations and charges for such service as bailee as it may see fit. Such charges are not carrier charges in the meaning, intendment, or prescription of the statute. Under the head of *Carriers*, the American and English Encyclopædia of Law, page 880, vol. 2: "A carrier, fulfilling the duties of a warehouse man, is not obliged to accept the goods subject to his ordinary liability. He may impose such terms as he pleases, and the consignor (consignee), with notice thereof, will be bound. Whether such terms are or are not reasonable is an irrelevant inquiry." In a note to this section is the following: "We can see no reason why a railroad company, as

Opinion.

a common carrier, cannot stipulate, by a contract express or implied, that their liability as carrier shall terminate with delivery at a particular point, and they will assume no liability at all in such case as warehousemen. If the consignee is fully advised at the time of the shipment that the company has no agent at a particular station, or the place to which the consignment is made, and the failure to employ such agent is not shown to be unreasonable in view of the condition of the company's business, there is, in the absence of rebutting circumstances, an implied consent that the carrier's responsibility shall be dissolved, when he has done all that the nature of the case permits him to do, according to the reasonable and proper usages of his business."

Hutchinson on Carriers, section 378, says: "The custody and protection of the goods in his new character as warehouseman is a distinct service from that of their transportation, which entitles him to additional compensation, in consideration for which he continues liable for their safe keeping as the hired bailee of the owner."

The record in this case shows that, at the time of the shipments of this lumber, the plaintiffs knew that there was a depot at Salem for the ordinary business of the company, but not for the accommodation of car loads of lumber, and that, if they did not unload the cars, according to the contemplation of the contract, within seventy-two hours (exclusive of Sundays and holidays) after one day for placing the cars and notice, they would have to pay one dollar per car per day thereafter—not for transportation and delivery—but for the detention of cars and use and occupation of the tracks of the railroad company. The statute provides solely for the transportation, storage, and delivery of freight to the carrier, to be shipped by it and delivered at the other end of the journey to the consignee, but it makes no provision or regulation for the hiring of cars to be loaded and unloaded by the customer, according

Opinion.

to such contract as the carrier and the customer may make, express or implied. "A railroad company is not required by law to keep a warehouse or depot at every station along its route or line; and it may stipulate, either expressly or by implication, that it will assume no liability as warehouseman at a flag station where it has no depot or agent, and when the consignee is fully advised, at the time of the shipment, that the company has no depot or agent at such station, and it is not shown that the exigencies of its business required that it should have an agent at the place, the liability as common carrier terminates with the safe delivery of the goods on the side track at that point, and it assumes no liability as a warehouseman." It is shown in evidence that this rule and charge of one dollar a day for the unreasonable and even long continued detention of the car, and obstruction of the tracks and business of the railroad, is not made for compensation to the company, but for the benefit of the public and a stimulus to the consignee to unload the car and disencumber the track and the business of the road. The evidence in the record is that the car is much more valuable to the company than the charge of one dollar per day, and it is manifest that, if cars can be delayed and held by shippers or consignees for months (as the record shows was done in this case in some instances) without any regulation that would be operative, the business of the railroad and the public service must necessarily suffer. In view of the authorities and the facts of this case we are of opinion the money paid by the plaintiffs to the defendant company was properly charged by the said company, and was due to it by the plaintiffs, Adams, Clements & Co., and they had no right to recover it back, and that the circuit court of Roanoke county erred in the law as applicable to the facts of the case, and erred in refusing to set aside the verdict of the jury; that the judgment complained of is erroneous, and the same is reversed and annulled. And this court, proceeding to

Opinion.

enter such judgment as the circuit court ought to have entered upon the pleadings, will dismiss the plaintiff's suit.

LACY and HINTON, JJ., dissented.

JUDGMENT REVERSED.

NOTE BY REPORTER.—For a discussion of the law of "demurrage" see note to the report of this case. 22 L. R. A., p. 530.

Richmond.

PHILLIPS v. COMMONWEALTH.

JANUARY 18th, 1894.

CRIMINAL PROCEEDINGS—*Continuance*.—After a former conviction set aside on appeal, defendant moved for a continuance for absence of a material witness from sickness, but convalescent and able to attend (in defendant's opinion); at the term to which he moved the case to be continued, though the physician stated there was but little chance of his recovery; *held*, refusal to grant the continuance was a reversible error.

Error to judgment of the corporation court of city of Alexandria, rendered January 27, 1892, upon a verdict of guilty of murder in the first degree, returned by the jury at the trial of an indictment against the plaintiff in error, Jefferson Phillips, for the murder in the first degree of one George S. Smith, by which judgment the plaintiff in error was sentenced to be hanged by the neck until dead. Opinion states the case.

Edmund Burke and *E. S. Brent*, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LACY, J., delivered the opinion of the court.

This is a prosecution against the plaintiff in error for murder, and the conviction herein is the second conviction of the said plaintiff in error. The first conviction, which on the 27th day of January, 1892, was of murder in the first degree,

Opinion.

and the accused was sentenced to be hanged; but on writ of error to this court on that conviction and sentence, on the 10th day of February, 1893, the said judgment was reversed and annulled, the verdict set aside, and a new trial awarded the plaintiff in error. Upon a second trial in the said corporation court of the city of Alexandria, the judgment was rendered which is now here the subject of review, whereby the accused was convicted of murder in the second degree, and sentenced to imprisonment in the penitentiary for a term of eight years.

The first assignment of error is the refusal of the trial court to continue the case on the ground of the absence of the witness Green, who was a member of the bar of that court, who had been duly summoned, and the summons returned executed, whose materiality was duly attested, and which was known to the court, he having testified at the first trial. It was proved by his attending physician that the said Green (the witness) was sick, with the chances against him as to his recovery, but there was a possibility of his recovery. The accused, in his affidavit, sets forth that the said Green was convalescent, and that he would, as he believed, be able to attend the July term, the trial taking place in May; and that he could not safely go to trial; that he has discovered additional evidence which the said Green could offer to the court, and that the motion was not made for delay, or to evade trial, but was *bona fide*, that he might be able to meet and make defense to the charge brought against him; and it is stated upon the trial by the counsel that the said Green is now well and able to attend court to testify. Under these circumstances, it is insisted by the plaintiff in error, that the trial court ought to have granted the short continuance asked for, and that its refusal has resulted in a denial of justice.

The rule upon which the court proceeds in considering a motion for a continuance is well settled; and has often been the subject of decision in this court. In *Hewitt's Case*, 17 Gratt., 629, Judge Moncure said on this subject: "A motion for a

Opinion.

continuance is addressed to the sound discretion of the court, under all the circumstances of the case; and, though an appellate court will supervise the action of an inferior court on such a motion, it will not reverse a judgment on that ground, unless such action was plainly erroneous. As a general rule, when a witness for a party fails to appear at the time appointed for a trial, if such a party show that a *subpœna* for a witness has been returned executed, or, if not so returned, was delivered to the proper officer of the county or corporation in which the witness resides, a reasonable time before the time for the trial, and shall swear that the witness is material, and that he cannot safely go to trial without his testimony, a continuance ought to be granted. The party thus shows, *prima facie*, that he is not ready for trial, though he has used due diligence to be so; and, in the absence of anything to show the contrary, the court ought to give him credit for honesty of intention, and continue the case if there be reasonable ground to believe that the attendance of the witness at the next term of the court can be secured, especially if the case has not been before continued for the same cause. But circumstances may satisfy the court that the real purpose of the party in moving for a continuance is to delay or evade the trial, and not to prepare for it, and in such case, of course, the motion ought to be overruled." See 3 Rob. Pr. (O. S.) pp. 140, 141; Savage, C. J., in *People v. Vermilyea*, 7 Cow., 383; *State v. Lewis*, 1 Bay., 1; *Com. v. Knapp*, 9 Pick., 515; *Roussell's Case*, 28 Gratt., 936, opinion of Burks, J., citing and approving Judge Moncure's opinion in *Hewitt's Case*, *supra*; *Gwatkin v. Com.*, 10 Leigh, 687; *Walton's Case*, 32 Gratt., 863, opinion of Judge Moncure, a case very similar to this; *Hook v. Nanny*, 4 Hen. & M., 157, note; *Higginbotham v. Chamberlayne*, 4 Munf., 547; *DeFord v. Hayes*, 6 Munf., 390; *Harris v. Harris*, 2 Leigh, 584; *Harman v. Howe*, 27 Gratt., 676; *Bland & Giles County Judge Case*, 33 Gratt., 447. The authorities on this subject are collated in an admirable article in 3 Amer. & Eng. Enc. Law, pp. 804, 821.

Opinion.

We are not unmindful that there have been two convictions by two juries herein. The first conviction has been annulled by this court as unlawful, and the same set aside. The case was sent back for a new trial to be had therein, and this new trial can be, and to be without any prejudice from the first conviction, which was null. Upon the second trial, as upon the first, the accused was entitled to be fully heard. His witness was not dead, but sick; he might recover (as he has done). The accused swore to his materiality, and there is no ground, and none is alleged, to believe that he was not a material witness. We think the accused was entitled to be fully heard before he was condemned. An accused cannot be fairly tried until he has been fully heard under the established rules of law as set forth above (*Welsh v. Com.*, ante p. 318), and the corporation court erred in overruling the motion of the accused for a continuance on the ground stated, and for that cause it must be reversed and annulled. It is not necessary to consider the exception based upon the action of the court in overruling the motion of the accused for a change of venue, because of local prejudice, as an impartial jury, free from exception, was obtained from another county.

JUDGMENT REVERSED.

Richmond.

RICHMOND & DANVILLE RAILROAD CO. v. DE BUTTS.

JANUARY 18th, 1894.

RAILROADS—*Employees—Contributory negligence.*—Brakeman, side-tracking flat car, train having backed into siding, cut car loose, and signalled train to leave it. Car not clearing main track he signalled train to return and push it further. Train returning fast, he put one foot between iron rails loaded on car, and end of car, and other foot outside so as to set brake. Train struck car and rails slipped forward and crushed his foot.

Held:

Brakeman's negligent acts caused the accident, and he is not entitled to recover.

Error to judgment of circuit court of Culpeper county, rendered November 16, 1890, in action of trespass on the case, wherein D. F. De Butts was plaintiff, and the plaintiff in error, the Richmond and Danville Railroad Company, was defendant. Judgment being according to verdict for plaintiff for \$7,500, defendant company brought the case here on error. Opinion states the case.

W. H. Payne, for plaintiff in error.

F. L. Smith & Ed. Burke, for defendant in error.

LACY, J. delivered the opinion of the court.

The action was for an injury received by the plaintiff, Du-lany F. De Butts, the defendant in error here, against the

Opinion.

Richmond and Danville Railroad Company, while in the employment of the company as brakeman at Culpeper Courthouse, on the 25th day of December, 1889. Arriving at Culpeper Courthouse with a freight train on which he was employed, De Butts was directed to assist in side tracking and dropping one of the cars of the train, which had become disabled for further travel on account of a hot box and a broken journal. De Butts mounted this car, and the train pulled up and backed into the siding. De Butts cut the car loose and signalled the train to pull up and leave it. Another brakeman of the same train was put in charge of the switch, which he unlocked with a key which he took from his pocket. De Butts finding as the train pulled out that the car was not within the distance post, signalled for the train to come back, his object being to have the car that he had cut loose, and on which he was standing, pushed further into the side track within the distance post. The brakeman gave the signal to the engineer to come back, and he reversed and came back. The car on which De Butts was standing was a gondola, loaded with iron rails, which were somewhat shorter than the car, and there was a space between the end of the iron rails and the framing of the car. De Butts, seeing this, and thinking the train was coming rather fast, put one foot inside of the frame of the car and the end of these iron rails, and kept the other foot on the outside, so as to set the brake on the gondola car. When the train struck the stationary car loaded with iron rails, the iron rails slipped forward on the floor of the car and caught De Butts's foot and hurt it, and hurt the other leg also. He was extricated from his position by the conductor, who was at the time in the office at the depot, sending a dispatch to the proper authorities to give information of the fact that the disabled car had been side-tracked there, and would be left behind when the train moved on to its destination. Being thus hurt, De Butts left the employment of the company, and brought this suit for damages for the stated injury. At the trial there was

Opinion.

evidence adduced on both sides, and instructions asked by the defendant and refused by the court, and exceptions taken, and a motion to set aside the verdict by the defendant made and overruled and excepted to, and the evidence certified. There was a verdict for the plaintiff for \$7,500, upon which judgment was rendered, and the case brought here by writ of error by the defendant.

The evidence shows that the plaintiff in the action, the defendant in error, was injured seriously in the foot. And we must next consider whether the injury was caused by the negligence of the railroad company, and, if so caused, whether the plaintiff was innocent or himself guilty of negligence which contributed to the accident as a proximate cause, without which it would not have happened. The conductor of the train had gone into the office of the company, and left the engineer and crew to shift this car to the side track, while he sent a dispatch. If this can be considered negligence under the circumstances of this case, it is the sole indication thereof. But, if so, then the plaintiff, De Butts, was guilty of negligence—first, in cutting off this disabled car outside the distance post; secondly, in putting his foot inside a box car loaded with railroad iron (iron rails), against which a train was presently to bump by his own signals. Without these acts, or either of them, the accident in question would not have happened.

It was the plain and well understood duty of De Butts as brakeman to cut this train loose, and signal the train away after it had gotten inside the distance post. So well did he understand this duty that he needed no instructions to bring the train back when he discovered his own neglect of duty in leaving the car outside of the distance post. If he had observed this post at the proper time all would have been safe. He says he put his foot inside in front of this pile of heavy iron to keep from receiving an injury. Why would this foot be less likely to be hurt on the platform outside the car than the one foot he did leave outside, and which was not hurt?

Opinion.

He says he signalled the engineer to stop, and was not obeyed; that the engineer could not be seen by him nor he by the engineer. Why did he signal the engineer, whom he could not see, and who therefore could not see him, in preference to the fellow brakeman, who he says stood at the switch, and was necessarily in full view of him, on an unobstructed track only a few yards off? It was a lack of diligence, and in itself negligence, to give signals to a person out of sight, and then act as if they would be obeyed. We are of opinion that the negligence of the company is not established, and it is clear, we think, that the defendant in error was guilty of contributory negligence in putting his foot inside the box car in front of iron rails when he knew that the car was about to be struck by the train to move it, and especially so, as he himself says, when he saw that the train was coming back fast enough to strike hard. *R. & D. R. R. Co. v. Risdon's adm'r*, 87 Va., 335; *R. & D. R. R. Co. v. Moore*, 78 Va., 96; *Clark v. R. & D. R. R. Co., Id.*, 717; *O'Connell's Case*, 20 Md., 212; *Scally's Case*, 27 Md., 589; *Wonder's Case*, 32 Md., 419; *N. & W. R. R. Co. v. Cottrell*, 83 Va., 519; *C. & O. R. R. Co. v. Lee*, 84 Va., 642; *Improvement Co. v. Andrew*, 86 Va., 270; *Tyler v. Sites' adm'r*, 88 Va., 470, and cases cited. We are of opinion, therefore, that the plaintiff was not entitled to recover in this case. The judgment of the circuit court appealed from here must therefore be reversed and annulled, and the case remanded for a new trial.

LEWIS, P., and HINTON, J., dissented.

JUDGMENT REVERSED.

Richmond.

CHAPMAN v. CHAPMAN.

JANUARY 18th, 1894.

1. **WILLS—Construction.**—Testator by his will says: "I loan to my wife all my estate not heretofore disposed of, during her natural life, and after her death I wish that estate sold and the proceeds equally divided between my four above-named children, or their lawful heirs begotten of their bodies."

HELD:

- (1.) The word "loan" is, in this will, used as equivalent to the word "give." *Wade v. Boxley*, 5 Leigh, 481.
- (2.) The gift to the children vests immediately, so that an assignment by one of them during the widow's life is valid.
- (3.) The word "or" must be read "and," and the word "heirs" taken in its usual and legal sense as a word of limitation. *Gish v. Moorman*, 89 Va., 345.

Appeal from decree of circuit court of Madison county, rendered at its April term, 1891, in a suit in equity wherein Thomas A. Chapman was plaintiff, and Thomas W. Chapman and others were defendants. The single question involved in the appeal appears from the opinion.

John E. Roller, for appellant.

James Hay and *T. C. Gordon*, for appellees.

LEWIS, P., delivered the opinion of the court.

Opinion.

The testator, Thomas Chapman, after providing in his will for each of his four children, added a sixth clause as follows, to wit:

"It is my wish and desire that all of my estate, both real and personal, which I have not heretofore disposed of, I loan to my wife, Elizabeth Chapman, during her natural life, and my wish is that the property I have loan to her, after her death, both real and personal, should be sold by my executors, and the money arising from the same should be equally divided between my four children, above named, or their lawful heirs begotten of their bodies."

One of the children, James E. Chapman, assigned his interest, and died before the life tenant. The question, therefore, is, whether the gift to the children, under the sixth clause of the will, vested immediately, or was postponed to the death of the life tenant.

In support of the latter view the appellant lays much stress on the word "loan," as manifesting an intention on the part of the testator to annex the time of distribution to the substance of the gift. But it is clear that the will was written *in ops concilii*, and that the word, like the word "lend," in *Wade v. Boxley*, 5 Leigh, 442; *Moon v. Stone*, 19 Gratt., 130, and other cases, was used as the equivalent of *give*. Nor is there anything in the will to support the appellant's contention. The object of the testator evidently was to provide a life estate for his widow, and to defer the distribution for no other purpose than to give precedence to that estate. Hence, the gift is in substance a gift to the children, subject to the life interest of Mrs. Chapman; or, in other words, the title is conferred immediately, though the enjoyment in possession is postponed. *Hunsford v. Elliott*, 9 Leigh, 79; *Martin v. Kirby*, 11 Gratt., 67; *Brent v. Washington*, 18 *Id.*, 526; *Gish v. Moor-maw*, 89 Va., 345, and cases cited.

Jarman lays it down, and such is the universally recognized

Opinion.

doctrine, that "even though there be no other gift than in the direction to pay or distribute *in futuro*, yet if such payment or distribution appear to be postponed for the convenience of the fund or property, the vesting will not be deferred until the period in question;" and by way of illustration he adds: "Thus, where a sum of stock is bequeathed to A. for life, and after his decease, to trustees, upon trust to sell and pay and divide the proceeds to and between C. and D., or to pay certain legacies thereout to C. and D., as the payment or distribution is evidently deferred until the decease of A. for the purpose of giving precedence to his life interest, the ulterior legatees take a vested interest at the decease of the testator." 2 Jarm., Wills (5th Am. ed.), 458.

There is, indeed, nothing better settled in this court than that all devises and bequests are to be construed as vesting at the testator's death, unless the intention to postpone the vesting is clearly indicated in the will. *Sellers' ex'or v. Reed*, 88 Va., 377; *Jameson v. Jameson*, 86 *Id.*, 51.

In the present case the fact that the gift is to the children "or their lawful heirs begotten of their bodies" does not make the gift contingent. The money arising from the sale of the property, after the death of the life tenant, was at all events to be equally divided into four parts, and paid to the testator's four children "or their lawful heirs," &c., which means that it was to be paid to the children living at the death of the life tenant, or to the representatives of such as might then be dead, the words "or their lawful heirs," &c., being words of limitation, and not the substitution of a new class of beneficiaries taking as purchasers from the testator. For to effectuate the intention of the testator we must read "and" for "or," and give to the word "heirs" its usual and legal signification. *Parkin v. Knight*, 15 Sim., 83; *Patterson v. Hawthorn*, 12 S. & R., 112; *McGill's Appeal*, 61 Pa. St., 46; *Linton v. Laycock*, 33 Ohio St., 128; *Gish v. Moormaw*, 89 Va., 345; *East v. Garrett*, 84 *Id.*, 523.

Opinion.

In this view of the case, the decree appealed from, upholding the assignment by James E. Chapman, as the transfer of a vested interest, is right, and must be affirmed.

DECREE AFFIRMED.

Richmond.

HARDIN v. ALEXANDRIA INSURANCE CO.

JANUARY 18th, 1894.

1. INSURANCE—*New policy—Case at bar.*—Assured asked company's agent to permit removal of insured property. Agent said there were so many endorsements on old policy it would be best to cancel it and take a new one for the return premium at *pro rata* rates. Company issued a new policy expiring at an earlier day, but it was not delivered to assured. The property was burned after expiration of the new, but before that of the old policy: **HELD:** The company is liable for the loss.
2. AGENTS—*Case here.*—Insurance company supplies one with all needful blanks, responds to his acts, approves of his permits to remove insured property, and pays the rent of his office; **held,** it is bound by his doings as its agent.

Argued at Wytheville. Decided at Richmond.

Appeal from decree of circuit court of Wise county, rendered at its December term, 1892, in chancery cause wherein J. M. Hardin, the appellant, was complainant, and the Alexandria Insurance Company was defendant. The object of the suit was to compel the company to issue to the complainant a policy of insurance on a certain stock of merchandise pursuant to a contract theretofore made by the company with him, and to pay the loss thereon, amounting to \$750 with interest from October 26, 1891. The court below dismissed his bill with costs against him, and he appealed. Opinion states the case.

Bullitt & McDowell, for appellant.

George A. Mushback and Burns & Fuller, for appellee.

Opinion.

FAUNTLEROY, J., delivered the opinion of the court.

The facts which appear by the record are as follow: In November, 1890, one G. W. Lovell, whose occupation was general insurance business at Big Stone Gap, Wise county, Va., went to see W. S. Reese, who told him that he wished an insurance upon his stock of liquors and bar fixtures, and asked the rate, and was told by Lovell that the rate was three per centum. Whereupon Reese instructed Lovell to write a policy for \$1,000. Lovell went to his office, where he had the blank forms and instructions of the Alexandria Insurance Company, and filled in a policy, as instructed, for \$750 insurance upon the stock of liquors, and for \$250 insurance upon the bar fixtures, furniture, &c., and mailed it to the "Alexandria Insurance Company, Alexandria, Virginia." Lovell, in a few days, received from that company a policy covering the property with insurance of \$750 on the stock of liquors and \$250 on the bar fixtures, furniture, &c., in the two-story frame building, metal roof, on Wyandotte avenue, Big Stone Gap, Va., for one year from 12 M. November 25, 1890, to 12 M. November 25, 1891. This policy he delivered to the insured W. S. Reese, and recieved from him the premium of \$30 for the Alexandria Insurance Company. On the 2d day of December, 1890, Lovell endorsed on this policy a permit for Reese, the insured, to remove the stock of liquors to a storage house in rear of the original place, and mailed the said policy, thus endorsed, to the company for its approval. The company did approve the permit so endorsed by Lovell upon the said policy and returned it, with its approval, to Lovell, who delivered it to Reese. On the 7th of May, 1891, Reese assigned this policy to J. M. Hardin, the appellant, by a writing, witnessed by Lovell, who sent the said policy, so endorsed with the said assignment, to the Alexandria Insurance Company, who approved it and returned it to Lovell, who delivered it to said Hardin. Thus in May, 1891, the original policy became the

Opinion.

property of Hardin (the appellant) with the sanction of the company to the assignment and to the removal of the stock insured from the two-story frame house to the storage house in its rear. On or about 27th of July, 1891, Hardin removed the stock of liquors insured from the storage house to the "Intermont Hotel," and, through Lovell, obtained from the Alexandria Insurance Company its approval and permit to Hardin of this second removal. About the 31st of August, 1891, Hardin informed Lovell that he had removed the stock of liquors to the Summerfield House or building, and asked Lovell to give him a permit or approval of the said transfer. Lovell told Hardin that as there were so many endorsements on the policy, it would be better to cancel it and take out a new policy for the return premium. Hardin was in a great hurry and told Lovell to do that. Lovell called Hardin back and told him to wait till he could fill in the receipt for the return premium, when Hardin said to Lovell: "Show me where to sign; you can fill in the amount." This Lovell did, and filled in \$5, according to the *short rate* table; though he wrote at the foot of the said receipt for the return premium, "cancelled *pro rata* and new policy to be issued." Lovell then sent this original policy, so endorsed, to the Alexandria Insurance Company, who kept or suppressed it; and, instead of issuing a duplicate of the original policy as Hardin expected, issued a new and *different* policy according to the *short rate* table (while the original policy was according to the *pro rata*) for \$1,000 on stock, which device and arrangement shortened the life of the policy to the 9th of October, 1891, instead of the 25th of November, 1891, and made it expire on the 9th of October, 1891.

This new policy was sent by the Alexandria Insurance Company to Lovell, but it never came to the hands or to the sight of Hardin. Hardin was absent in Norfolk when it came to Lovell, and Lovell left it, he says, at the Summerfield House, which was not Hardin's place of abode and in which he had no concern except the liquor stored there.

Opinion.

Hardin contends and deposes that he had only \$882 in stock, and had not asked for insurance of \$1,000, nor for over \$750. On the 26th day of October, 1891, the Summerfield House was burned down, and in it the stock of liquors was destroyed of the value of \$882.

The Alexandria Insurance Company, on demand, refused to pay the insurance, and denied all liability on the ground that the new policy expired on the 9th of October, 1891, and that no policy existed on the 26th of October, 1891. Had the new policy (issued by the insurance company but never delivered to Hardin) been a duplicate of the original (as Hardin claimed and expected), at *pro rata* rates, as the original was, it would not have expired till after the 26th of October, 1891, the date of the fire, and it would have covered the loss. It was wholly different from the policy which Lovell suggested to Hardin to obtain, because of the numerous endorsements on the original, the only reason assigned by Lovell and urged upon Hardin for cancelling the original policy and taking out a new one. This advice and this reason was the only cause of Hardin's agreeing to Lovell's suggestion, and he reasonably understood and relied upon Lovell that the new policy was to be the same as the one surrendered, for convenience only, because the original was covered all over by oft-repeated endorsements. The question now is, who is responsible for this change of policies—a change certainly not intended or expected by Hardin? The responsibility lies between the Alexandria Insurance Company and Lovell, on whom Hardin relied as the authorized agent or representative of the company. Either Lovell misinformed the company as to the terms of the new policy asked for by Hardin, and did not apprise the company of the reason why Hardin asked for a new policy, and that, too, on Lovell's suggestion and the reason for the suggestion, or else the company deliberately ignored the understanding between Lovell and Hardin, and arbitrarily issued the new policy to suit itself, at short table rates, instead of according to the memorandum

Opinion.

endorsed upon the original policy by Lovell, "Cancelled *pro rata*, and new policy to issue." The new policy, as written, was never contemplated, nor asked for, by Hardin. It was the device of the company or of Lovell. If it was the work of the company, it is responsible for destroying Hardin's security for \$750 insurance upon the stock insured. If it was Lovell's act, and he misled the company, whose medium he was, it is liable and responsible for his acts in the conduct of its business. Both Lovell and the company claim that the company had never issued a commission to him as their agent, and that he was acting only as a broker. But this is playing upon words, and the whole testimony and the transaction itself, show that he was held out to the public as the agent or intermediate of the company, by and through whom all transactions with the company by parties seeking or having insurance must pass, subject to approval. The insurance company furnished him with all needful papers and blanks, responded to his acts, approved permits of removal given by him, and paid his rent, thereby treating and holding him out as agent to the public, who had the right to deal with the company by and through him as their agent in fact. Otherwise the public would be misled and defrauded by either, or by a combination of both.

The Alexandria Insurance Company must be held responsible for the loss occasioned to Hardin by a change of his policy of insurance, which was made by it, and not intended or contemplated by him, and brought about, either by the agent Lovell, or by the act of the company, of its own motion, or by a combination of the company and Lovell.

The decree appealed from is erroneous, and must be annulled and reversed, and this court, proceeding to render such decree as the circuit court of Wise county should have entered in the cause, will enter a decree for the appellant, according to the prayer of his bill, which the circuit court erred in dismissing.

DECREE REVERSED.

VOL. XC—53

Richmond.

BUFORD v. NORTH ROANOKE LAND & IMP. CO.

JANUARY 18th, 1894.

1. *DEED—Construction—After-born child—Case at bar.*—Conveyance of land to "the lawful heirs of J. and R.," who were then living and had three children, and a fourth child was born to them after date of deed: *held*, the deed gave a fee in remainder to three children to be opened for the fourth child when born.
2. *MARRIED WOMEN—Adverse possession—Case at bar.*—It appearing that the four children held jointly, adversary possession of the land until 1843, when the fourth child was under the disability of coverture and remained such till after 1881: *held*, there could be no adversary possession against her in favor of her co-tenants during her coverture.
3. *CHANCERY PRACTICE—Answer—Case at bar.*—Code, section 3275, allows defendant to file his answer any time before final decree. In the case here, ten days after the rendition, by default, of a decree final *in form*, the defendants, during the same term, presented their answer to the bill, showing a probable title to the land in question; but the court below refused to allow the answer to be filed solely on the ground that it "was presented too late."

HELD:

The ruling was error.

4. *CASES COMPARED.*—*Gerst v. Jones*, 32 Gratt., 528, distinguished from the case here.

Argued at Wytheville. Decided at Richmond.

Appeal from decree of hustings court of city of Roanoke, rendered September 26th, 1891, in a chancery suit wherein the North Roanoke Land and Improvement Company was complainant, and William L. Williamson, wife, children, and

Statement—Opinion.

others, and the appellants, Herbert D. Buford and Nugent Buford were defendants. Opinion states the case.

G. W. & L. C. Hansbrough, for appellants.

Phlegar & Johnson, for appellees.

FAUNTLEROY, J., delivered the opinion of the court.

From the record in this cause it appears that, by deed of the 8th of September, 1810, one John Campbell and wife conveyed to one Robert Filson 175½ acres of land, composed of three parcels, and that, by deed of the 8th of October, 1810, the said Robert Filson and wife, in consideration of £1,000, conveyed the same three parcels of land, aggregating 175½ acres, to the "lawful heirs" of said John Campbell and Rebecca, his wife.

The said John Campbell and Rebecca, his wife, had, at the date of the said deed of October 8, 1810, three children—Robert, Clack R., and Susan; and, after the said date of October 8, 1810, Matilda, a fourth child, was born to them, the said John and Rebecca Campbell. The said Matilda married Daniel Stoner, and from her the appellants, Herbert D. C. Buford and Nugent Buford, are lineal descendants. There is no evidence of any *partition* having been made of these 175½ acres of land, and there is no record of any deed of partition vesting the title in severalty in any one in any part of these 175½ acres of land, though it is averred, *without proof*, that there was a deed of partition which had been lost and never recorded. Clack R. Campbell resided, from 1843 till his death in 1881, on a part of this undivided 175½ acres, and held exclusive possession and enjoyment of it and built upon it. It is said in the depositions that this part was defined by rock fences, though it is not proved that the said fences were put there by Clack R. Campbell, or after he went on it, or as line fences of this particular part.

Opinion.

Clack R. Campbell died in 1881, leaving a will by which he devised all of his realty to his wife, Lucy, for her life, with remainder after death to his niece, Nannie L. Williamson, for life, with remainder over, in fee, to the children of said Nannie L. Williamson.

On the part of which the said Clack R. Campbell resided there is "Lot number 6"—the part which is the subject of the controversy in this case. The aforesaid Mrs. Nannie L. Williamson had several children, the remainder men, in fee, under the will of Clack R. Campbell, and a suit was instituted in the circuit court of Roanoke for the sale of the realty to which the said children (then infants) were entitled in remainder, and this suit embraced "Lot number 6." The record of that suit is not in the record in this cause, and whether the proceedings had were such as are requisite in the sale of infants' land does not appear. The appellants charge that they were not. Be that as it may, it seems that there was a decree for sale, and a sale made to M. P. Preston and his associates, who sold this "Lot number 6" to the appellee, the North Roanoke Land and Improvement Company, for \$27,500, who, being advised that there was a cloud upon the title, brought this suit in chancery in the hustings court of Roanoke city to clear the title.

The Bufords, appellants, were made parties, but they lived in another county, one hundred miles away, and the bill was taken *pro confesso* as to them, and all the other parties defendant, the Williamsons only having answered the bill.

The hustings court of the city of Roanoke, on the 16th day of September, 1891, rendered a decree, final in form but not in operation, during the then current term of the court, in favor of the appellees affirming the title made to them by Preston and others, and derived from Clack R. Campbell, through the Williamsons.

The appellants—the Bufords—on the 26th day of September, 1891, during the same term of the hustings court, moved the court for leave to file their demurrer and answer, which

Opinion.

motion the court overruled and refused the leave. From this decree the Bufords appeal, assigning but one error—the refusal of the court to allow them to file their answer and make defence to the suit against them.

The answer was tendered, and the leave to file it asked for during the term of the court at which the decree of the 16th of September, 1891, was rendered, and it does not appear that the decree of the 16th of September, 1891, had been actually entered upon the chancery order book by the clerk, before the motion for leave to file the answer was made and refused by the court, upon the sole ground that it was “*too late*.” The affidavit of G. W. Hansbrough, who appeared for the Bufords, says that he had been employed by them only the day before—the 25th.

The answer tendered by the defendants—the Bufords—sets forth such a defence as, if sustained, would have changed the decree rendered on the 16th of September during the same term, and set up a title to an undivided interest in “lot number 6,” sold by the Williamsous to Preston and by Preston, &c., to the appellee. The answer asserts that, by the deed of October 8, 1810, from Filson, a title to an undivided share of the 175½ acres of land enured to *Matilda*, the daughter of John and Rebecca Campbell, born after the date and recordation of that deed, as well as to and equally with Robert, Clack R., and Susan—the sons and daughter of John and Rebecca Campbell—born before and living at the date of the said deed from Filson. That this undivided share of the said *Matilda* descended, in part, to the said Bufords, who are shown and admitted to be her lineal descendants. Also the shares of Robert Campbell and Susan Campbell (Thrasher), which they conveyed by deed of August 15, 1853, to Daniel Stoner, and by Stoner to Nefinger, trustee. That no partition of the said 175½ acres was ever made, and no allotment in severalty was ever made, among the joint or common owners; that the entire four, Robert, Susan, Clack R., and *Matilda* (their ances-

Opinion.

tress), did hold the said $175\frac{1}{2}$ acres of land jointly, and that no ouster of Matilda was ever made, or is charged; that the relation of joint tenants between the said *four* has never been changed, nor the legal title in severalty has never vested in any one of the said *four* to any part of the said $175\frac{1}{2}$ acres; that the statute of limitations is not applicable here, and is no bar to appellants' title.

The transaction of 1810 was an arrangement by John Campbell for the benefit of all the children who were, or who might be, born to him and his then wife Rebecca. It gave a fee, in remainder, to one undivided *third* to Robert, Susan, and Clack R., respectively, to be opened for Matilda when born. That the lawful heirs of John and Rebecca Campbell, his wife, meant their children who at their deaths should be ascertained to be their lawful heirs, and that all four—Robert, Susan, Clack R., and Matilda—were deemed to be entitled jointly, is admitted and averred in the bill, where it is alleged that “they, Robert, Susan, and Clack R., took possession of the ($175\frac{1}{2}$ acres) land, and that they, together with said Matilda, continued so to hold the same jointly, openly, adversely, notoriously, and exclusively, till 1843. This establishes the fact that the whole four had title and held the land jointly, in fee, until 1843; and there is nothing in the record to show any change in the joint character of their estate, or any vesting, in fee, in severalty, in any one of the four in any part of the said $175\frac{1}{2}$ acres of land.

The entry upon and exclusive use and occupation of a part of the land by Clack R. Campbell, one of the tenants in common or joint owners of the undivided whole $175\frac{1}{2}$ acres, did not destroy the joint character of the title, nor sever the part on which he so resided, from the joint estate of the whole $175\frac{1}{2}$ acres.

The case presented in the answer of the defendants (Bufords) showed a state of things, which made it even probable that the respondents, Bufords, had title—a case to which the facts in

Opinion.

the record gave strong color—which had never been argued, and which the court could and should have given them time and opportunity to argue and to prove; yet the court below, in the very teeth of the Code of Virginia, 1887, section 3275, which commands that a defendant shall be allowed to file his answer at any time before final decree (whether entered or not), refused them the privilege of answering and making their defence. See *Bean v. Simmons*, 9 Gratt., 371; *McVeigh v. Underwood*, 23 Gratt., 419.

This case is not within the rule of *Gerst v. Jones*, 32 Gratt., 528, and other cases cited, which decide that where there has been a trial and errors committed, in admitting or in rejecting evidence, or in giving or refusing instructions, and this court can see, from the whole evidence certified, that the party appealing could not have sustained prejudice by the ruling of the trial court, in such a case, this court will not set aside a verdict. This is a case in which no trial was had and no decision pronounced, but the mere denial of a trial and the refusal of the trial court to receive and consider the answer of defendants solely on the ground alleged in the decree that "the answer was presented too late." The bill itself charges that the four children (including Clack and *Matilda*) held jointly adversary possession of the land until 1843, and she is shown, by the record, to have been, at that time, a married woman under disability of coverture, and to have been alive in 1881, and, presumably, alive up to a much later period. The denials of the answer, had it been admitted, would have overcome any and all presumptions that there had ever been any partition of the land and allotment in severalty. The record shows that, in 1843, when Clack R. Campbell took possession of the lot in controversy, *Matilda Stoner* was under coverture as the wife of Daniel Stoner, and there is no evidence to show when her disability ceased, and Clack R. Campbell could not hold adversary possession against her. No conveyance nor partition of land will be presumed against a *feme covert*. John

Opinion.

Campbell died in 1863, Rebecca, his wife, having pre-deceased him; and his heirs, at that event, were his said four children, of whom *Matilda*, the wife of Daniel Stoner, was one, and she, being a married woman, and remaining such, so far as this record shows, till her death, at some period subsequently to 1881.

The appellants, who were defendants below, were illegally and unjustly debarred, by the decree appealed from, from filing their answer and making their defence. The decree of September 26th must be annulled and reversed; the decree of September 16th suspended; and the cause sent back, with leave to the appellants to file their answer and be allowed time and opportunity to take evidence to support their defence.

DECREE REVERSED.

Richmond.**RICHMOND & MECKLENBURG R. R. CO. v. HUMPHREYS.**

JANUARY 18th, 1894.

1. **RAILROADS—Trespass—Liability—Case at bar.**—Railroad company, without authority, erected expensive improvements on plaintiff's land. Becoming insolvent, its franchises and property were purchased by another company: **HELD:** The purchaser is liable for the land taken without considering the benefit from the construction of the railroad, and for the damage to the residue of the land.
2. **IDEM—Measure of damages—Evidence.**—In such case, *held*, the amount of the damages, as respects the residue of the land, is the difference in the market value of the land before and after the taking thereof; and as respects the land taken, including said improvements, is the fair cash market value of the land and said improvements at the time of the taking in view of the uses to which they have been put; and it was not error to refuse to allow a witness to testify that he had donated similar property to the company.
3. **PRACTICE AT COMMON LAW—Continuance.**—Under the circumstances set forth in the opinion, *held*, not error to deny the motion for continuance.

Appeal from decree of circuit court of Mecklenburg county, rendered June 6, 1892, in a suit wherein Thomas F. Humphreys was complainant and the Richmond and Mecklenburg Railroad Company was defendant. The land of complainant was illegally entered by a railroad company which erected thereon expensive stone and earth works. That company became insolvent, and the defendant company purchased its franchises and property. The object of the suit was to compel payment for the right of way. An issue out of chancery was ordered, and at the trial the jury assessed the plaintiff's dam-

Statement—Opinion.

ages at \$7,079 with interest from January 1, 1882. The court below approved the verdict, and from its decree the defendant appealed. Opinion states the case.

B. B. Munford and Thomas N. Williams, for appellant.

Finch & Atkins and W. W. Henry, for appellee.

RICHARDSON, J., delivered the opinion of the court.

This is the second time this case has been before this court; and for a full statement of the circumstances under which the controversy arose, and the merits of the controversy, reference is made to the opinion of this court when the case was formerly here. See *Humphreys v. Richmond & Mecklenburg R. R. Co.*, 88 Va., 431.

For the purposes of this opinion, it is sufficient to say that the appellee, Humphreys, was a subscriber to the capital stock of the Richmond & Mecklenburg Railroad Company in the sum of \$1,000, which had been reduced by payments to \$700. Humphreys was at this time the owner, by purchase, of a tract of land on Roanoke river, near Clarksville, over which, prior to the purchase of Humphreys, the old Roanoke Valley Railroad Company had erected costly stone piers in Roanoke river, a stone abutment at the bank of said river, and an extensive earthwork or embankment from said abutment to the high ground south thereof, as and for a part of its roadway. This work was constructed without authority of law, the Roanoke Valley Railroad Company never having in any way acquired the right of way over this tract of land, though it had acquired the right of way through and over most of the other lands along its proposed railway. Before completing its road, the Roanoke Valley Railroad Company became insolvent, and, by purchase, the Richmond and Mecklenburg Railroad Company became its successor and the owner of all the rights of way

Opinion.

which had been lawfully acquired by it, but did not thereby become the owner of the right of way, nor of the stone and earthwork aforesaid, on and over the track of land owned by the appellee, Humphreys, which, as before stated, had never been acquired by said Roanoke Valley Company.

Humphreys having subscribed as aforesaid to the capital stock of the Richmond & Mecklenburg Railroad Company when that company was about proceeding to construct its road, its agents were directed to solicit the donation of the right of way by the land owners, respectively, along the proposed road, to the company. The president of the company, J. B. McPhail, after frequent and urgent importunities, representations, and promises, finally induced the appellee, Humphreys, to execute the paper, known in the original record as exhibit "A," which, upon its face, was an unconditional obligation on his part to convey to the Richmond & Mecklenburg Railroad Company, when thereto requested by the president of said company, the right of way through and over his said tract of land; and said paper was delivered to said McPhail, but upon the agreement and understanding between him and Humphreys that said paper should not be delivered to said company except upon just compensation by it to Humphreys for the stone and earthwork aforesaid, including the land proposed to be taken, and for damages to the residue of the tract of land, unless the withholding of said paper would endanger the construction of the road.

McPhail, though he had undertaken and promised to do so, and had thereby induced Humphreys to execute said paper "A," never presented to the directory of his said company the claim of Humphreys to compensation, nor did he ever take any steps to secure the same; but, on the contrary, long after the building and equipment of his company's road was fully assured, and when the company had ample means with which to make just compensation to Humphreys for his property, turned said paper "A" over to his said company, and thence-

Opinion.

forth the company claimed that by that paper Humphreys had made an absolute and unconditional donation of the right of way over his said land, including the valuable stone and earth work aforesaid, and that he was bound to convey the same to the company, as provided on the face of said paper. This contention was denied by Humphreys, who insisted that said paper was executed by him and delivered to McPhail, as his agent, upon and subject to the conditions above named, neither of which conditions had been performed, and that, instead of delivering said paper to the company, he should, under the circumstances, have delivered it up to Humphreys. In the mean time, and prior to the institution of this suit, the Richmond and Mecklenburg Railroad Company instituted an action at law in the circuit court of Mecklenburg county against said T. F. Humphreys to recover from the latter the balance due on his said subscription of \$1,000 to the capital stock of said company. At the October term, 1885, of said court, with the leave of court, Humphreys filed his bill against the Richmond and Mecklenburg Railroad Company, setting forth substantially, but more in detail, the circumstances and facts above referred to, and praying for an injunction restraining said railroad company from proceeding in said action of law until the further order of the court; that said paper "A," executed on the 3d of October, 1881, be declared null and void; that the damages to the plaintiff's land be set off against his said subscription, &c., and for general relief. A temporary injunction was accordingly awarded the plaintiff, Humphreys, but on condition of his confessing judgment in said action at law for the balance due on his said subscription, and judgment was accordingly confessed.

The Richmond and Mecklenburg Railroad Company answered the bill, admitting, in effect, that it had not in any way acquired the right of way over the plaintiff's land other than by said paper "A," and insisting that by said paper Humphreys made an unconditional donation of said right of way,

Opinion.

including said stone and earth work, and that he was estopped thereby from raising any question as to the company's right to said property, and that it was entitled to have a conveyance of same from Humphreys according to the terms of said paper.

Being thus at issue, both parties took depositions, and the cause having been matured, came on and was heard by said circuit court on the 15th day of April, 1889, when a decree was therein rendered dissolving the injunction theretofore awarded in the cause, and dismissing the plaintiff's bill. From that decree the plaintiff, Humphreys, obtained an appeal to this court. Upon the hearing of that appeal this court held that said paper "A," executed and delivered by said Humphreys to said McPhail, on the 3d day of October, 1881, was so executed and delivered upon certain conditions, neither of which had been performed, and that the same was null and void; and this court so holding, entered a decree here reversing and annulling the decree of the circuit court of Mecklenburg appealed from, to wit: the decree of April 15, 1889, and remanding the cause to the said circuit court with instructions to restore the case to its place on the docket, to be proceeded in to a final decree, and with a further instruction that, when the case should be entered for hearing, the said circuit court should direct an issue *quantum damnificatus* to be tried at the bar of said court, on the law side thereof, to ascertain the damages aforesaid, and that when the same should be so ascertained and duly certified to the chancery side of said court, should be setoff against said judgment at law confessed by the appellant in favor of the Richmond & Mecklenburg Railroad Company, and that the excess, if any, over and above said judgment, be decreed against said railroad company in favor of the appellant, Humphreys.

When the case went back to the circuit court, that court, at the January term thereof, 1892, made an order in the cause directing the issue required by the decree of this court; and at the May term thereof, 1892, the case was tried, and the jury

Opinion.

returned the following verdict: "We, the jury, upon the issue joined, find in favor of the plaintiff, T. F. Humphreys, and ascertain his damages to be \$7,079, with interest from January 1, 1882." And judgment was accordingly entered on the law side of said court, and the same being duly certified to the chancery side of said court, the following decree was entered in the cause:

"And this court, approving said verdict, in accordance therewith and with the decree of the Supreme Court of Appeals, pronounced on the 14th of December, 1891, doth adjudge, order, and decree that the plaintiff do recover of the defendant the said sum of \$7,079, with legal interest thereon from the 1st day of January, 1882, till paid, and the legal costs of this suit, including the cost of the said issue, and the cost awarded by the Supreme Court of Appeals, to be credited by the judgment confessed by the plaintiff in favor of the defendant on the 9th of October, 1885, for \$695, with legal interest thereon from the 10th of January, 1885, and \$9 56, cost of said judgment.

And the court doth further adjudge, order and decree, that whenever the defendant shall pay the above decree, interest and cost, that then the plaintiff and his wife do execute and deliver to the defendant a proper deed, acknowledged and ready for record, conveying to the defendant the 3.83 acres of his land taken by it in its right of way through his land, with all the earthworks and masonry thereon or thereto belonging, and all claims for damages done to the residue of his tract by reason of the construction or completion of its line of road through it. From this decree the defendant obtained an appeal to this court.

The questions to be decided by this court are presented in the five several bills of exception taken by the defendant to certain rulings of the trial court.

1. The defendant's first bill of exceptions is to the action of the court in refusing its motion for a continuance of the cause,

Opinion.

on the ground that a witness for the defendant, one W. S. Gooch, a resident of Louisa county, Va., more than one hundred miles distant from Boydton, Mecklenburg county, Va., the place of trial, and who, it appeared, had been duly served with process on the 31st day of May, which process was issued on the 28th of May, 1892, to appear on the 2d of June, 1892, the time fixed for the trial, and that said Gooch was not present. This bill of exceptions sets forth that when the case was called for trial on the 2d day of June, 1892, and before the jury had been sworn to try the issue, the following statement was made to the court by counsel for the defendant, to-wit: That the defendant was not prepared for trial, and asked for a continuance or postponement for the reason then stated by counsel as follows: That some time before the trial, to-wit, about the middle of May, an arrangement was entered into between Thomas N. Williams, resident counsel for the defendant company, and Beverly B. Munford, of Richmond, division counsel of the defendant company, on the one hand, and Messrs. Finch & Atkins, attorneys for Thomas F. Humphreys, on the other, by which it was agreed that the trial of this case should be commenced on Wednesday, the 8th of June, 1892; that relying upon this agreement, Beverly B. Munford, of counsel for the company, had made arrangements which were imperative and which could not be changed—one in Baltimore for the 2d of June, and one at another point for the 3d of June—and could not, therefore, be present. The court so certifies and it is doubtless true that these statements were made by the counsel for the defendant, who was present at the trial; but it is also true that no exception was taken to any action of the court refusing to continue the case on the ground of absence of counsel. Such statements of counsel are therefore out of the case, and the only question properly raised by this, the defendant's first bill of exception, is as to the refusal of the court to continue the case on account of the absence of the witness Gooch. It is true that the court certifies that counsel for the

Opinion.

defendant stated to the court that said Gooch was the contractor who did the work for the defendant company over the lands, abutments, &c., in controversy, and was a witness material for the company's defence, and that it could not go to trial in his absence; but it is equally true, as certified by the court, that neither of the counsel for the defendant company had ever talked with said Gooch about the matter in controversy in this case. And it is further certified in this bill of exceptions that, on the 28th of May, it appearing to the court that the arrangement fixing the 8th of June as the time for the trial of the case was made, and was stated by counsel for the plaintiff, and not denied by counsel for the defendant, subject to the approval of the court, counsel for the defendant stating that it had to be subject to the approval of the court; and that the court being satisfied that the business of the court would be completed several days before the 8th day of June, stated to counsel that, when the cases on the docket had all been disposed of, it would adjourn, and would not be willing to wait several days longer to try this case; that thereupon counsel for the plaintiff stated that they were very desirous of trying the case at that term of the court, and that, if there was any doubt as to the court's remaining in session until after the 8th of June, they desired to fix some earlier day for the trial of the case; that thereupon, it being conceded that all the cases upon the issue docket would be disposed of by Wednesday, the 1st day of June, the court fixed upon Thursday, the 2d day of June, for the trial of the case, and informed counsel that on that day the case would be called and either tried or continued if proper grounds were shown for a continuance; and that, on the second day of June, Mr. Munford being still absent when the case was called, the court refused the motion of counsel for the defendant to further postpone or to continue the case, or to delay the trial until the 8th day of June, on account of the absence of the witness, W. S. Gooch.

The question is, did the defendant company bring itself

Opinion.

within the rule applicable to continuances of causes? We think it clearly did not. About six months has elapsed since the order was made directing the issue in the cause, all of which period, except a very few days just preceding the trial, was permitted to pass without any effort to ascertain, either by talking with the witness or by corresponding with him, what would be the character of his testimony, or whether it would be material or not. And notwithstanding the agreement between counsel, made about the middle of May, subject to the approval of the court, that the case should be tried on the 8th day of June, the summons for this witness was not issued until the 28th day of May, the day on which the court fixed upon the 2d day of June for the trial of the case, and only three or four days prior to the trial. This, so far from evincing that degree of diligence required by the rule, shows gross negligence and indifference on the part of the defendant. Moreover, the witness residing more than one hundred miles distant from the place of trial, the defendant could, under the statute, § 3365, Code 1887, have taken his deposition. The cases of *A. & D. R. R. Co. v. Peake*, 87 Va., 130, and *Meyers, &c., Receivers v. Trice*, 86 Va., 835, relied on by counsel for the appellant, were decided upon grounds entirely different from those insisted upon in the present case, and have no application to this case. It is perfectly clear that the trial court did not err in overruling the defendant's motion for a continuance.

2. The defendant's second bill of exceptions sets forth that, after all the plaintiff's evidence had been introduced, the defendant company, to sustain the issue on its part, introduced one J. J. Love, and, through its counsel, stated to the court that it desired to prove by said witness that he, said Love, was the owner of a property on the opposite side of the river from the property owned by the plaintiff, on which had been erected an embankment, piers, and an abutment similar to those on the plaintiff's land, and that he (Love), had given the right of way, including said piers, abutment and embankment, to said

Opinion.

railroad company, in order that the jury, from these circumstances, might form some estimate of the value of the plaintiff's property at the time of the construction of said railroad. But the court refused to allow the witness to be introduced for such purpose, or to allow counsel for the defendant to ask any such questions. It goes without saying that the court did not err in this ruling, and it would be a useless waste of time to further consider the question.

3. The defendant's third bill of exceptions sets forth that upon the trial of the cause counsel for the plaintiff, in his closing speech, stated to the jury that the plaintiff was entitled to recover the value of said piers, abutment, and embankment for railroad purposes; and that counsel for the defendant then asked the court to inform the jury that such statement did not embody the law, and that the plaintiff could only recover the market value of the property as of the time it was taken, which the court refused to do, stating that it would not at that time, and in the midst of the argument, give any instruction. It is clear that the court did not err in this respect. The request of counsel that the court should arrest, and thereby disarrange the argument of counsel, in order to then instruct the jury upon the law of the case, was premature and opposed to the well settled rules of practice. Moreover, the instruction asked for did not correctly propound the law of the case.

4. The defendant's fourth bill of exceptions is to the refusal of the court to give to the jury two instructions asked for by counsel for defendant, and in giving in lieu thereof three instructions of its own. In this exception the court certifies all the evidence in the cause.

By the first instruction asked for by counsel for the defendant the court was asked, in effect, to say to the jury that in ascertaining the damages to the plaintiff's land taken, and the damages to the residue of the trust, they should award an amount equal to the difference between the market value of

Opinion.

the property at the time it was taken and the market value after the same had been taken. The second instruction asked for by counsel for the defendant company lays down an entirely different rule for ascertaining the value of the property taken, namely, the fair cash market value of the land, right of way, embankment, abutment, and piers so taken, at the time of taking the same, and concludes by asking the court to say to the jury that, in ascertaining the plaintiff's damages, they should not consider the value of the property to the defendant company for railroad purposes. The two instructions thus asked for by counsel for the defendant were properly refused by the court—first, because they are inconsistent with each other, and calculated to confuse and mislead the jury, and to leave them to grope their way in darkness and ignorance as to which of the two conflicting instructions should be their guide in arriving at their verdict; and, second, because neither of said instructions correctly propound the law applicable to the case.

On the other hand, the instructions given by the court, of its own motion, in lieu of the instructions asked for by counsel for the defendant, do correctly state the law of the case:

1st. The first of these instructions follows the statute, § 1078, Code 1887, and says to the jury that they shall ascertain and determine from the evidence what would be a just compensation to the plaintiff for the land taken by the defendant, the Richmond and Mecklenburg Railroad Company, and for damages to the residue of the tract, beyond the peculiar benefits derived by him in respect to such residue by the completion of said railroad.

2d. The second of said instructions says to the jury that, in ascertaining the damages to the residue of said tract, they shall award the plaintiff, Humphreys, an amount equal to the difference between the market value of the residue at the time of the taking and its market value after the same had been so taken. And in ascertaining said damages they may consider

Opinion.

every circumstance, present or future, which affected its then value.

3d. The court further instructs the jury that the amount to be awarded Thomas F. Humphreys for his land taken, including the embankment, abutment, and piers upon said land, or belonging thereto, is the fair cash market value of the said land, embankment, abutment, and piers so taken, at the time of the taking, and said damages are to be assessed in view of the uses to which the said land, embankment, abutment, and piers have been put, and not necessarily in view of the use or productive value to the owner before the taking.

These instructions, and especially the third and last one, given by the court in lieu of those asked for on behalf of the defendant, are logically adapted to the principles applicable to the peculiar circumstances of the case in hand, that no argument is needed to enforce them. The question presented has been clearly and definitely settled by the highest court in the land, and the doctrine there held has been recognized and enforced by many other courts of very high authority. In *Boom Company v. Patterson*, 98 U. S. R. 403, the Supreme Court of the United States has so clearly stated the doctrine as to leave no room for doubt. In that case the defendant in error, Patterson, was the owner in fee of an entire island, and parts of two other islands in the Mississippi river above the falls of St. Anthony, in the county of Anoka, in Minnesota, which, it seems, were unproductive and valueless to him or to any one else for any other than boom purposes. The land on these islands, owned by the said Patterson, the boom company sought to condemn for its uses, and upon its application commissioners were appointed by the district court to appraise its value, and they awarded to the owner the sum of \$3,000. From this award both the company and the owner appealed. When the case was brought before the district court, the owner, Patterson, who was a citizen of the State of Illinois, applied for and obtained its removal to the circuit court of the

Opinion.

United States, where it was tried. The jury found a general verdict, assessing the value of the land at \$9,358 33, but accompanied it with a special verdict assessing its value, aside from any consideration of its value for boom purposes, at \$300, and, in view of its adaptability for such purposes, a further and additional value of \$9,058 33; whereupon, the company moved for a new trial, and the court granted the motion, unless the owner would elect to reduce the verdict to \$5,500. The owner so elected, and thereupon judgment was entered in his favor for the reduced amount. To review this judgment the company took the case to the Supreme Court of the United States on a writ of error, and that court affirmed the judgment of the circuit court. The only question applicable to the case here in hand, which was decided by the Supreme Court, was as to the amount of compensation the owner of the land was entitled to receive, and the principle upon which the compensation was to be estimated.

In delivering the unanimous opinion of the court Mr. Justice Field said: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted—that is to say, what is it worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is perhaps impossible to formulate a rule to govern its appraisalment in all

Opinion.

cases. Exceptional circumstances will modify the most carefully guarded rule ; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future. The position of the three islands in the Mississippi fitting them to form, in connection with the west bank of the river, a boom of immense dimensions, capable of holding in safety over twenty millions of feet of logs, added largely to the value of the lands. The boom company would greatly prefer them to more valuable agricultural lands, or to lands situated elsewhere on the river ; as, by utilizing them in the manner proposed, they would save heavy expenditures of money in constructing a boom of equal capacity. Their adaptability for boom purposes was a circumstance, therefore, which the owner had a right to insist upon as an element in estimating the value of his lands."

The principle thus applied is, beyond all question, a just one, and Mr. Justice Fields' argument in support of its application is unanswerable. The same principle applies with even greater force to the case here under consideration ; for in that case the property condemned was taken as it came from the hand of nature, while here the valuable earthwork and masonry, on the land taken by the appellant company, had been erected for railroad purposes, and was adapted to such purposes. Here another railroad company had erected without lawful authority the earthwork and masonry in question, for railroad purposes, and the appellee becoming subsequently the owner of the land, including said earthwork and masonry, was, as respects the latter, as much entitled to the fair market value of same, viewed with reference to the purposes for which they were taken and the uses to which they have been applied, as if he had erected them at the special instance and request of the appellant company, and upon its promise, either express or implied, to make just compensation therefor. The appellant

Opinion.

company needed the appellee's property for railroad purposes, and, without lawful authority, took and appropriated it to railroad purposes, and, for over eleven years, has applied it to railroad purposes. It is with poor grace that the company comes now, after all the wrong and injury inflicted by it upon the appellee, and when common justice and the law call upon it to make restitution, asserting the monstrous claim that the appellee's damages must be estimated with reference to the productive value of the property before it was so taken.

We repeat, that the instructions given by the court in lieu of those asked for on behalf of the defendant, the appellant here, are eminently correct, and that the trial court did not err, either in refusing said instructions asked for by the defendant or in giving the instructions which it did give.

5. The defendant's fifth and last bill of exceptions is to the action of the court overruling its motion to set aside the verdict of the jury and grant it a new trial, upon the ground that the verdict was against the law and the evidence. It is only necessary to say that the facts proved fully warranted the verdict. Indeed, in view of the evidence, the jury might well have found a verdict for a much larger amount. This court could not, therefore, without improperly invading the rightful province of the jury, undertake to disturb the verdict. Moreover, the trial judge, both in the conduct of the case and in expounding the law applicable thereto, appears to have presided with conspicuous ability and fairness. There is nothing, therefore, of which the appellant company can justly complain. For these reasons we are of opinion that the decree appealed from is without error, and that the same must be affirmed.

LACY, J., dissenting, said:

I do not concur in the opinion of the court, and file my own dissenting views. This is an appeal from a decree of the cir-

Dissenting Opinion.

cuit court of Mecklenburg county, rendered on the 6th day of June, 1892. This is a case arising out of proceedings under the decree rendered in this court on the 14th day of December, 1891, in the case of *Humphreys v. R. & M. Railroad Co.*, which case, at its first hearing in this court, is reported in 88 Va., 431, which is referred to for the proceedings then had and the conclusions reached. By said decree of this court it was directed that an inquiry of damages should be made and tried at the bar of the circuit court by a jury, to ascertain the damages done to the appellant, Humphreys, by the said railroad company, by entering upon and using his land, earthwork, or embankment, and masonry on his land, or belonging thereto, at the time they were so taken possession of, and the damages to the residue of the appellant's said tract of land resulting from any work of the railroad company on said embankment after the railroad took possession thereof, and the same, when ascertained, to be set off against the judgment confessed by said Humphreys in favor of the said railroad company, which judgment was for the amount of his subscription to said company still unpaid. When the case went back, a jury was impaneled, and the amount of damages found by their verdict was \$7,079, with interest from January, 1882. The defendant moved the court to set aside the said verdict, which motion was overruled, and judgment was rendered on the verdict, and the defendant appealed.

The errors assigned here are: First, the refusal of the circuit court to continue the case on account of the absence of a material witness; second, the refusal of the circuit court to continue the case because of the absence of the leading counsel for the defendant; third, the exclusion of the evidence of the witness Love, by whom it was desired to show the cost, if any, to the company, of the right of way through the land of the witness, which was on the opposite side of the river, and exactly like the land of Humphreys, containing pillars in the river, and an embankment and old railway bed across the low-

Dissenting Opinion.

grounds on the river; fourth, because of misdirection by the court as to the law of the case and the proper method of ascertaining and estimating the amount of damages; fifth, the refusal of the circuit court to set aside the verdict and grant a new trial to the defendant company.

We will pass by, for the present, the first and second assignments of error, as to the action of the court in refusing a continuance to the defendant upon the ground of the absence of a material witness, and the absence of the leading counsel for the defendant, as they will appear to be immaterial, in view of my conclusions herein.

I think there was no error in the third assignment, as the fact that the witness Love had given away for nothing his property, although exactly like the property of Humphreys, could not in any way affect the amount of damages proper when the land had not been given.

The fourth assignment of error is because of the action of the court in giving the following instruction to the jury: "They are further instructed that, in ascertaining the damages to the residue of the tract, they shall award said Humphreys an amount equal to the difference between the market value of the residue of the said tract at the time of its taking and its market value after the same had been so taken; and in ascertaining said damages they may consider every circumstance, present or future, which affected its then value. The court further instructs the jury that the amount to be awarded the said Humphreys for his land taken, including the embankments, abutments, and piers upon said land, or belonging thereto, is the fair cash market value of the said land, embankment, abutment, and piers to be taken, at the time of the taking, and said damages are to be assessed in view of the uses to which said land, embankment, abutment, and piers have been put, and not necessarily in view of the use or productive value to the owner before the taking"—having also, on the motion of the plaintiff, instructed the jury that they should

Dissenting Opinion.

determine from the evidence what would be a just compensation to the plaintiff for the land taken by the defendant, and for damages to the residue of the tract beyond the peculiar benefit derived by the plaintiff in respect to such residue by the completion of said railroad; and in refusing certain other instructions asked for by the defendant railroad company, as follows: "The court instructs the jury that they shall ascertain and determine from the evidence what would be a just compensation to the plaintiff for the land taken by the defendant, and for the damages to the residue of the tract beyond the peculiar benefits to be derived in respect to such residue. They are further instructed that in ascertaining the damages for the land actually taken, and to the balance of said tract, they shall award said plaintiff an amount equal to the difference between the market value of his property at the time of the taking and its market value after the same had been so taken. The court further instructs the jury that the amount to be awarded said plaintiff for the right of way through his land, including the embankment, abutment, and piers on said right of way, *is the fair cash market value of the land, right of way, embankment, abutment, and piers so taken, at the time of the taking, and not what the same may be worth to the railroad company for railway purposes.*"

The dispute as to these instructions arises upon the words italicized above, as follows: The plaintiff claimed, and the court so instructed, "that the said damages are to be assessed in view of the uses to which said land, embankment, abutments, and piers have been put," whereas the defendant claimed and the court rejected its instruction so directing, that the amount of the damages is "the fair cash market value of the land, right of way, embankment, abutments, and piers so taken, at the time of the taking, *and not what the same may be worth to the railway company for railway purposes.*" In determining the true measure of damages in a case like this, I will remark that the statute prescribes (sections 1077, 1078, Code,) when the con-

Dissenting Opinion.

demnation is by commissioners under chapter 46, that the commissioners, after viewing the land, and having such proper evidence as either party may offer, shall ascertain what will be a just compensation for the said land, and for the damages to the residue of the tract beyond the peculiar benefits to be derived, in respect to such residue, from the *work to be constructed*. In this case, as is fully explained and set forth in the opinion of this court by Richardson, J., on the former appeal to this court, in *Humphreys v. R. & M. Railroad Co.*, 88 Va., 431, before cited, the defendant company entered upon this land by virtue of a right of way in writing from Humphreys, which was set aside and annulled for reasons there stated, no condemnation proceedings being had or deemed necessary, and, as has been already shown from the decree of this court, the case was remanded for such inquiry of damages to be made by a jury, and the measure of damages stated in the instructions by the court in accordance with the statute, (section 1078, Code,) thus: "*What* would be a just compensation to the plaintiff for the land taken by the defendant, and for damages to the residue of the tract beyond the peculiar benefit derived by him in respect to such residue by the completion of said railroad," and this principle is substantially restated in different language in the second instruction. In the third instruction the provision objected to is inserted as is already set forth, thus: "And said damages are to be assessed in view of the uses to which the said land, embankment, abutment, and piers have been put, and not necessarily in view of the use or productive value to the owner before the taking." The added words, "And said damages are to be assessed in view of the uses to which the said land, embankment, abutment, and piers have been put," indicate that the character of the proceeding have been obscured or lost sight of. Our law proceeds upon the idea of a just compensation for what private property is taken for public uses, and provides for compensation to the land-owner for injury to the residue of the tract by reason of the taking of

Dissenting Opinion.

a part of the land. These damages are for compensation for an injury resulting from a lawful act. Our constitution prohibits the taking of private property for public purposes without just compensation. The compensation is allowed for the actual taking, and, so far as the actual taking is the cause of a resulting deprivation of right, it is a taking in the constitutional sense, and the law requires that it likewise shall be compensated by a just compensation. If the whole, and not the part, only, be taken, just compensation for what was actually taken would be the complete measure of relief. There would be no damages beyond that to be assessed. There would be no damages to be paid in excess of just compensation for the whole, and it would not be contended that the measure of compensation could be otherwise than the full value of the property taken; for it must be borne in mind that the transaction is a lawful one, and bears in it no element of a tort.

Regarding the transaction, then, and all the proceedings thereunder, from the standpoint of compensation, where can we find any place for damages to the plaintiff for the use to which the defendant is to put the property taken, unless we are to compensate the land-owner for what is not his? What are his proprietary rights in the railroad of the defendant? Does it affect his rights that this railroad, when completed, is worth \$15,000 per mile, or that it is a public incorporated turnpike worth but little, or a county road with no marketable value, provided it has been lawfully taken for public purposes under the right of eminent domain? If he has received just compensation for what has been taken directly and what has been taken incidentally, all that has been taken from him having been paid for, can he go further and lay a valid claim to the subsequent use to which it has been put? What is the proper amount of compensation we are not now considering in this case. The question is what is the true measure of damages by way of compensation? This is a matter of law to be decided by the court; and when this has been correctly decided

Dissenting Opinion.

by the court the jury must follow the direction of the court or their verdict cannot stand. What is just compensation for what is taken is one question here. In considering the phrase "just compensation," a learned author says (Sedg. Dam.): "The general principle running through the cases seems to be that a just compensation to the owner for taking his property for public use without his consent means the actual value of the property in money without any deduction for estimated profit or advantages accruing to the owner from the public use of his property. Speculative advantages or disadvantages, independent of the intrinsic value of the property, from the improvement are a matter of set-off against each other, and do not affect the dry claim for the intrinsic value of the property taken." Our statutes, as we have seen, however, after providing that one of these shall be set off against the other, directs that the excess of the first (that is, of the injury to the residue, if any,) above the second (that is, the peculiar benefits to be derived in respect to such residue from the work to be constructed,) shall affect the dry claim for the intrinsic value of the property taken; but there is no provision for an allowance for the value of the property taken in the hands of its new owner. If it is more valuable then, or less so, the question of just compensation for what is taken is not thereby affected. The true interpretation of our statute is the question to be determined in this case. "Just compensation for what is taken is the value of the land taken for the uses to which it is suitable, having regard to the existing business wants of the community, or such as may be reasonably expended in the immediate future. The inquiry in such cases must be, what is the property worth in the market, viewed, not merely with reference to the uses to which it is at the time applied, but with reference to the uses for which it is plainly adapted—that is to say, what is it worth from its availability for valuable uses?" Opinion of Mr. Justice Field in *Miss. & Run River Boom Co. v. Patterson*, 98 U. S., 410. While disclaiming to

Dissenting Opinion.

lay down a rule to govern in all cases, this we consider the true rule, and the result of the cases which I have considered. It is right that the value of the earthwork, abutment, and piers for valuable uses should be considered as constituting an element of the value of the land; but the use to which it has been put is subsequent and independent of an ended transaction, and could not have been considered by any assessors of its value when taken, and the instructions complained of are to this extent erroneous; and, as it is impossible to determine to what extent this error may have governed the case in its results, it is error for which I think the judgment must be reversed.

DECREE AFFIRMED.

Richmond.

BROWN v. PUTNEY & ALS.

JANUARY 25th, 1894.

1. INFANTS' LANDS—*Exchanges—Validity*.—Under decree in suit by father in 1884, land of his infant children was exchanged for his own land. The bill was not filed by one authorized so to do, the trustee was not a party, and in other respects also the proceedings were not conformable to Code 1873, p. 932, even had that statute provided for the exchange of such lands: **HELD**: The exchange was not validated by the act of 1888, Sess. Acts 1887-'88, p. 504.
2. TRUST DEEDS—*Subjects of*.—Debtor may convey for his creditor's benefit property held by him nominally in trust for others, but equitably his own, and withhold property nominally his own, but equitably belonging to others.
3. *IDEM—Case at bar*.—In 1884 B. procured a decree for exchange of his own lot for a lot held by trustee for his wife and children, by proceedings not in accordance with the law. Later, by a trust deed reciting the invalidity of the exchange, he conveyed the former lot for his creditors' benefit and the latter lot for his wife and children's benefit. His creditors filed their bill, alleging the exchange to have been valid, and attacking the trust deed as voluntary and fraudulent. The court below overruled the demurrer to the bill and adjudged the trust deed void: **HELD**: Error.

Appeal from decree of circuit court of Amherst county, rendered October 15, 1890, in a suit wherein the appellees, Stephen Putney & Co. and others, were complainants, and the appellants, Benjamin Brown and wife and others, were defendants. Opinion states the case.

J. Thompson Brown and Caskie & Coleman, for appellants.

Opinion.

John H. Lewis, John L. Lee, and John B. Robertson, for appellees.

LACY, J., delivered the opinion of the court.

The bill in this case was filed by the appellees, Stephen Putney & Co., William Neely & Co., and Fleishman & Morris, on the 2d day of February, 1888, to set aside and annul a trust deed executed by B. Brown and wife to J. Thompson Brown, trustee, on the 19th of January, 1888, to secure certain creditors their several debts set forth in the said deed, among them the debts of the plaintiffs in the bill, which, however, were deferred and postponed to other creditors, who were preferred, the debts due the plaintiffs being arranged in the ninth class, and to secure in the said class all other debts due and owing by the grantor, B. Brown, but omitted and not mentioned in the said deed. The trustee was directed to take immediate possession of the property conveyed by the deed, sell the same, and deduct expenses, and distribute the net result among the several creditors according to their respective rights under the deed. The deed conveys a large quantity of real estate, as to which the wife released her contingent right of dower, for which she was to be paid \$400, which \$400 to the wife was first secured. Subsequently the appellees, Armstrong, Cator & Co., and others, creditors secured, but postponed to the remote ninth class, filed their petitions attacking the said deed in like manner. The gravamen of the attack upon the deed in the bill grows out of the following clause of the deed of January 19, 1888: "The dwelling house, and ten acres of land attached thereto, lying in the edge of the village of Amherst Courthouse, in the angle of Lynch's road and the Mount Moriah road, being the same now occupied as the residence of the said Benjamin Brown and family, and being so much of the same tract that was conveyed, as 30 acres 3 roods 15 poles, to the said Benjamin Brown by Edward S. Brown, as special

Opinion.

commissioner of the circuit court of Amherst county, in the case of *Davidson v. Smith, etc.*, by deed dated the 19th day of May, 1884, and recorded in the clerk's office of Amherst county court on the 27th day of May, 1884, to which deed reference is here now made. This house, and ten acres of land attached thereto, is identically the same which was attempted to be conveyed to the said Benjamin Brown, as trustee for his said wife and children, by a deed from Taylor Berry, as commissioner of the circuit court of Amherst county, under and by virtue of a decree of said court in a chancery cause styled *Benjamin Brown v. Taylor Berry, trustee, and others*, which deed is dated the 29th day of July, 1884, and was recorded in the clerk's office of the county court of Amherst county on the 4th day of August, 1884, to which, and to the said proceedings in said circuit court of Amherst county, which undertook to authorize it, reference is here and now made. But the said Benjamin Brown is advised that the deed last referred to is void, and has always been void; and the said Benjamin therefore disregards the said conveyance to himself, as trustee for his said wife and their children, treating it as though no such conveyance had ever been attempted to be made to him as such trustee, and has by his conveyance of the said property by his deed, as just set forth, treated the said dwelling house, and ten acres of land attached thereto, as his own, as in fact and in law it is, under and by virtue of the deed from Edward S. Brown, commissioner of the circuit court of Amherst county, in the case of *Davidson v. Smith, etc.*, hereinbefore recited and referred to. And so, likewise, the deed from Taylor Berry, as commissioner of the circuit court of Amherst, in the same cause of *Benjamin Brown v. Taylor Berry, trustee, and others*, made under and by virtue of the same decree as in the said cause aforesaid, by which deed, dated the — day of —, 1884, and was recorded the 5th of August, 1884, the fee-simple title to the property therein named and set forth was attempted to be conveyed to the said Benjamin Brown, is also

void, and has always been void, and therefore need not be released now by the said Benjamin Brown and wife. But in order to more effectually remove all cloud from the title to said property as held by Taylor Berry, trustee for S. P. Brown, wife of said Benjamin Brown, and their children, under the deed from said Benjamin Brown and S. P. Brown, his wife, to the said Berry, trustee, bearing date the 12th day of November, 1879, and recorded that day in the clerk's office of the county court of Amherst, in Deed Book LL, p. 492, they, the said Benjamin Brown and S. P. Brown, his wife, do hereby quitclaim, renounce, and release all right, title, interest, and benefit that was attempted to be conveyed to the said Benjamin Brown by the deed from said Berry, as commissioner of the circuit court of Amherst, under said decree in the said cause of *Benjamin Brown v. Taylor Berry, trustee, and others*, as hereinbefore mentioned. And so the effect of the failure to make the exchange of the properties as attempted to be made by the aforesaid proceedings in the circuit court of Amherst, was and is to leave the ownership of and title to the said properties, respectively, exactly where it was before such attempt was made to exchange them—that is to say, to leave the fee-simple title to the dwelling house, and the ten acres of land attached thereto, hereinbefore mentioned as being now conveyed by this deed, in the said Benjamin Brown under the deed to him from Edward S. Brown, special commissioner of the circuit court of Amherst county, in the case of *Davidson v. Smith, etc.*, hereinbefore referred to, and the title to the storehouse and lot in the village of Amherst Courthouse, in Taylor Berry, as trustee for Mrs. S. P. Brown, wife of said Benjamin Brown, and their children, under the deed from said Brown and wife to said Berry, trustee, dated and recorded on the 12th day of November, 1879, and hereinbefore referred to.”

The exchange of properties set forth in the said deed as above, was claimed to be a valid exchange, and that the business properties in the village were liable to the debts of credi-

Opinion.

tors in lieu of the residence property above described; that the said B. Brown had been enabled to obtain his credit from the plaintiffs and others by holding himself out as the owner of the business properties; that the settlement in the said deed attacked, by B. Brown on his wife, of \$400, in consideration of her uniting in the deed, and relinquishing her contingent right of dower in the land conveyed, was in excess of the true value of the wife's right; that the said deed might be set aside and annulled, and the property conveyed in the said deed be subjected to the payment of the debts of the plaintiffs, etc. Whereupon, the defendants demurred and answered, and the court decreed that the first-named cause of *Putney, etc. v. Brown, etc.*, be referred to a master for accounts: (1) Of all the real estate of B. Brown, and the annual and fee-simple value thereof. (2) An account of all the personal property purporting to be passed by the said trust deed. (3) An account of all the debts of B. Brown, and their priorities. (4) The value per cent of the contingent right of dower of Mrs. Brown. (5) An account of the transactions of J. Thompson Brown, trustee. (6) An account of the transactions of J. Thompson Brown as receiver. (7) An account of the personal property mentioned in the trust deed of 19th January, 1888, to J. Thompson Brown, trustee for Mrs. Brown, and the considerations therefor. (8) Any accounts deemed pertinent by himself, etc.

B. Brown demurred and answered, as we have said. In his answer he denied any intent to hinder, delay, and defraud creditors. Mrs. Brown, in her answer, denied all fraud, and insisted on her legal rights. The trustees, J. Thompson Brown and Taylor Berry, answered separately, and in accordance with their view of the legal right of their *cestui que trust*. S. P. Brown, wife of Benjamin Brown, by J. Thompson Brown, her next friend, filed her bill against B. Brown, asserting her rights under the said deeds, etc., to which B. Brown made formal answer, admitting the charges in the bill to be true.

Opinion.

Taylor Berry, trustee, answered for his *cestui que trust*, and submitted their rights to the court.

The commissioner of the court reported as to the several matters stated above. The evidence was taken in the form of depositions, and on the 15th day of October, 1890, the court rendered the decree appealed from here. Therein the demurrers of the defendants were overruled; sustained exception of Stephen Putney to the allowance of any dower to the wife of B. Brown in the ten-acre residence and store, except as to the surplus after satisfying the deed of September 26, 1884, to Gilliam & Co., and refused the first exception of the same parties to a commission; sustained the exchange of properties made in the suit of *B. Brown v. Taylor Berry, trustee*, declaring the said exchange valid and binding, and decreed that the above described business properties be subjected to the payment of the plaintiffs' debts, and, without deciding any other questions, ordered certain accounts; set aside and annulled the deed of B. Brown to J. Thompson Brown, trustee, of the 19th day of January, 1888, conveying certain personal property for the benefit of his wife, as voluntary and void as to the plaintiffs, and ordered the sheriff to sell the same; and appointed John L. Lee a special commissioner to rent out the above-described property and insure uninsured buildings, give bond, and report to the court. And this decree being interlocutory, but settling the principles in the cause, the appellants applied for an appeal to this court, which was allowed by one of the judges.

The first error assigned here is the action of the circuit court in overruling the demurrer of the defendants to the plaintiffs' bills, and overruling their motion to dismiss the said bills of the plaintiffs. The second error assigned is as to the action of the court in holding that the exchange above referred to, made in 1884, was valid. The third assignment of error is as to the action of the court in setting aside the deed of the 19th January, 1888, as to the *bona fide* creditors secured therein, who are

Opinion.

neither proved nor alleged to have been participators in the supposed fraud, whatever the court might hold as to the grantors therein.

Section 2460 of the Code of Virginia allows a bill to be filed by a creditor to set aside a conveyance, etc., declared void by sections 2458 and 2459, before obtaining judgment or decree, (this is upon the ground that the above sections refer to fraudulent acts that are void,) and expressly contains, in section 2458, a reservation in favor of a purchaser for valuable consideration without notice of the fraud. And section 2459 refers to voluntary conveyances not upon valuable consideration. The bill bases its ground of procedure upon the ground that the exchange cited above, in 1884, was effectual, and that the deed assailed conveyed, therefore, property as to which the debtor had no property rights, and failed to convey property which was liable for his debts. If the debtor made a release to his wife's trustee of the business property in the village in lieu of the residence and ten acres outside the village, it cannot be said to be voluntary and without consideration, and it cannot be said to be fraudulent, but it was made, however mistakenly, under the honest belief that he was entitled to the residence and adjoining lands which he conveyed to secure *bona fide* creditors. But how can this exchange of the infants' land in 1884 be upheld as valid? The statute (Code 1873, p. 931, c. 124, § 2) provides how infants' lands may be sold (if this attempted exchange could be treated as a sale). It is prescribed that this suit shall be brought by the guardian, or, if held in trust by the trustee, guardian, committee, or any person interested therein, who thinks the interests of the infants, etc., will be promoted by a sale, may file a bill for the purpose, stating plainly all the estate, real or personal, to which the infant may be entitled, verified by the oath of the plaintiff, and the infants, insane person, beneficiaries, and the trustee (when not plaintiff), and all other persons interested, shall be made defendants, and also, where there is an infant or insane defend-

Opinion.

ant, all those who would be his heirs or distributees if he were dead. This statute must be strictly followed. The bill was filed by B. Brown, who was neither guardian, trustee, nor a person interested in the estate. The subsequent act of 1888 (Acts 1887-'88, p. 504), which provides for exchanges, could not be held to validate such exchanges as were made without authority of law. The trustee was not a party. The depositions were taken without a guardian *ad litem* for the infant defendants, and were not, therefore, taken in his presence, nor upon interrogatories agreed on by him, and were in fact taken before the bill was filed. And the infants had already brought their suit to rehear the decree, rendered thus illegally against them.

The claim that improvements had been placed upon these properties by B. Brown, which could belong or be subjected by his creditors, is immaterial to the plaintiffs, because, whatever that claim was, it had been conveyed by the deed for the benefit of others, *bona fide* creditors of the grantor. And the same may be said of any excess of \$400 over the present value of the wife's contingent right of dower. So that it appears, in whatever aspect the case may be viewed, the bill of the plaintiffs could not be maintained, and should have been dismissed. The debts secured were and are admitted to be valid debts. It is nowhere otherwise alleged. The conveyance was neither fraudulent nor voluntary. It preferred certain creditors, but conveyed all the property of the grantor to secure all his creditors according to the schedule provided by the deed. The circuit court having decided otherwise, the decree of the said court must be reversed and annulled, and such decree will be rendered here as the said circuit court ought to have rendered.

DECREE REVERSED.

Richmond.

MOORMAN v. ARTHUR.

SAME v. TOWN OF DANVILLE.

JANUARY 25th, 1894.

1. **EQUITABLE RELIEF—Resulting trust.**—Equity hath exclusive jurisdiction where plaintiffs claim that land was bought with funds of their ancestors' estate by his administrator, who took the title in his own name, and afterwards listed it in his schedules in bankruptcy, but with a declaration of the said trust written therein, which affected with notice the purchasers of the land under the bankrupt proceedings.
2. **IDEM—Evidence—Case at bar.**—In the case here, *held*, that though parol testimony is admissible to establish a resulting trust against the letter of a deed, yet the trust must be proved, as alleged, by clear, cogent, and explicit evidence; and that the evidence adduced to establish the trust claimed by the plaintiffs, is not such, but on the contrary, is conflicting, improbable, and insufficient.
3. **RESULTING TRUST—Distributees—Creditors.**—Where administrator converts his intestate's personalty into real estate, a trust will result therein for the benefit of his widow as to one-third, and his children as to the residue; but his creditors may, through a court of equity, subject the real estate to the payment of their debts, if the personalty was liable therefor.
4. **BANKRUPTCY—Sale—Validity.**—Where land is sold under proceedings in bankruptcy, persons interested in the land, but not parties, are not bound by the sale, though the bankrupt was the administrator of the estate through which they claim.
5. **IDEM—Limitation of action—Laches.**—The federal statute limiting actions by or against assignees in bankruptcy as to property vested in them to two years, applies not to suits against purchasers from such assignees. Nor can the claims of persons to said property be barred by *laches* so long as they are ignorant of their rights. *Lamar v. Hall*, 79 Va., 164.

6. **WITNESSES—Competency.**—Two defendants, against whom no relief was prayed for, and who had been discharged in bankruptcy, *held*, not incompetent to testify, though parties to the suit and to the transactions under review therein.
7. **DECLARATIONS OF TRUST—Notice to purchasers.**—Where petitioner in bankruptcy appends to inventory of his property a declaration that one parcel had been bought with trust money, though it stood in his name, such declaration is unauthorized by the federal statute, and constitutes no notice of such trust to purchasers at the sale under the bankrupt proceedings.
8. **IDEM—When admissible.**—Such declarations to be admissible must have been made when declarant had no interest to make them, and not when made in favor of his own family against his creditors, by one who is not only insolvent, but in bankruptcy. *Phelps v. Seely*, 22 Gratt., 573.

Appeal from decree of circuit court of city of Danville, rendered May 26, 1891, in two chancery causes heard together; in the first Wm. A. Moorman and others being complainants and T. J. Arthur and others being defendants, and in the second Wm. A. Moorman and others being complainants and the town of Danville and others being defendants. The circuit court dismissed the bills and the complainants appealed. Opinion states the case.

John W. Riely, Berkeley & Harrison, and Christian & Christian, for appellants.

Green & Miller, Peatross & Harris, and George C. Cabell, for appellees.

FAUNTLEROY, J., delivered the opinion of the court.

In an elaborate and exhaustive opinion in writing, filed in the cause and made part of the decree appealed from, the judge of the said court reviews all the law and the evidence in the records so fully, so ably, and conclusively, upon every point of law and fact involved in the causes at issue, that it is the judgment of this court, after mature consideration of the whole

Opinion.

of the records brought under review by this appeal, to adopt the said opinion of the said judge of the circuit court of the city of Danville as the opinion of this court, and to affirm the decree appealed from, for the reasons therein set forth.

Opinion of Judge Whittle:

These causes are of more than ordinary importance, both on account of the value of the property in controversy, and of the legal questions involved; and they have been argued elaborately and with very great ability.

The first-named cause was instituted November 11, 1886; the second, April 25, 1887.

By a decree of the — term, 18—, they were ordered to be heard together; they were so argued, and will be so considered. The complainants are William A. Moorman, Samuel J. Moorman, and James C. Moorman, sons and heirs-at-law of James C. Moorman, deceased. The substantial defendants are purchasers, immediate and mediate, of the real estate sold under orders of the district court of the United States for the then district of Virginia, *in re*, W. W. Keen, bankrupt.

There is a discrepancy in the allegations of the bills in the two causes as to the property claimed, or rather as to the origin of the claim, the pleader in the second-named cause, it would seem, endeavoring to meet or conform to the facts developed by the evidence in cause No. 1. With this exception, which will be noticed later on, the allegations of the bills are substantially the same. They are, that James C. Moorman departed this life in Pittsylvania county, October 13, 1863, seized of valuable real estate and with large personal property, leaving him surviving a widow, Nannie C. Moorman, and complainants (who at the death of their father were all infants), William A. Moorman having been born October 15, 1856; Samuel J. Moorman, June 20, 1858, and James C. Moorman, May 31, 1863; that the widow intermarried with

Opinion.

one Charles Dougherty, October 29, 1867, and departed this life September 7, 1872, after the birth of a child, which died early in infancy, and that her husband, Charles Dougherty, is still living; that at the November term, 1863, of the county court of Pittsylvania county, W. W. Keen, the father of Nannie C. Moorman and the grandfather of complainants, qualified as the administrator of the estate of James C. Moorman, deceased, executing bond as such with security in the penalty of \$300,000; that said administrator promptly began to collect the assets of the estate, and within twelve months from his qualification made sales of tobacco amounting to \$30,000, and by February 1, 1865, made other sales of tobacco to the amount of \$53,433 71, and, in addition, realized large amounts of cash from other assets of the estate; that, being unable to find satisfactory investment for these funds (they say, in cause No. 2, he consulted and advised with his partner, James M. Walker, as to a proper investment), in the fall of 1863 or during the year 1864, he purchased 262½ acres of land from Decatur Jones as an investment of said funds, paying \$30,000 in cash of the moneys of said estate therefor, but took no conveyance of title; that, in 1863, he sold Dr. T. D. F. Guerrant about 92½ acres of land, lying almost wholly in the town of Danville, in the extreme western part thereof, on Dan river; that Guerrant paid the purchase price in full, and took immediate possession of the property, renting a portion of it in 1864 to J. J. Hankins, but neglected to take a conveyance; that during the year 1864, W. W. Keen concluded to repurchase said 92½ acres of Guerrant for the benefit of complainants and their mother, Nannie C. Moorman, and during that year exchanged with Guerrant the 262½ acres, theretofore purchased of Decatur Jones therefor, said Guerrant taking possession of the latter, and said Keen, as administrator, occupying and cultivating the farm for the benefit of complainants and their mother; that W. W. Keen had purchased the 92½-acre tract from James M. Walker, who, along with said Keen as W. W.

Opinion.

Keen & Co., had purchased it from E. F. Keen; that W. W. Keen did not convey the property to Guerrant, and when the exchange was made did not change the title on the deed-books, because he did not know how he could convey real property to himself as administrator. He therefore held the 92½ acres of land in his own name, but for the benefit and as the property of the estate of James C. Moorman, deceased. On February 6, 1867, Decatur Jones conveyed the 262½-acre tract to Guerrant; that on October 15, 1867, W. W. Keen went into bankruptcy, his petition bearing date October 5th of that year. Said petition was duly sworn to, and accompanying it were schedules "A" and "B," showing respectively his liabilities and assets. As the 92½-acre tract stood in his name, he was compelled to return the same in his schedule "B 1," and did so, but set forth in said schedule that "in the year 1863 or 1864, petitioner being the administrator of James Moorman, deceased, the general manager of his estate, and the father of his widow, and having in his hands large sums of Confederate money arising from sales of tobacco belonging to said estate, and becoming aware of the rapid depreciation of said money, and knowing of no investment which he could safely make in stocks or other securities, determined to invest a portion of the same in real estate for the benefit of said estate. Shortly after he purchased of Decatur Jones a tract of land lying in Pittsylvania county, Va., containing about 262½ acres, for the sum of \$30,000 in Confederate currency, which he paid in cash, which tract of land I had intended to cultivate, with the slaves belonging to said estate. Finding, however, that the interest of the estate would not be promoted by such a course, I exchanged the said tract of land with a certain T. D. F. Guerrant for a tract of land mostly within the corporate limits of the town of Danville, with good improvements, and to which there is attached a public ferry across Dan river. The said exchange was an even one. No title having been made to petitioner by Decatur Jones for the tract of land purchased of him at the

Opinion.

time of said exchange, he, by direction of petitioner, conveyed the same to the said Guerrant. The 92-acre tract referred to had been sold to said Guerrant by the petitioner, but not conveyed before said exchange was made. After said exchange the petitioner still held title to said land in his own name. His only reason for so doing was that he did not consider it competent for him to hold this land by deed as administrator (as has been stated). The tract of land was obtained in exchange for a tract which had been purchased with money belonging to said Moorman's estate, and has since been held as the property of said estate." (The bills give extracts from the statement in "B 1." The foregoing is the statement in full.) That, thus, W. W. Keen did not surrender said property in bankruptcy, having no beneficial interest in it, and none that, under the laws of the United States, could or did pass to his assignees or trustees in bankruptcy. In the bill in cause No. 2 the allegation in relation to the real estate in question are that some time prior to the fall of 1863 E. F. Keen sold to W. W. Keen and James M. Walker, as W. W. Keen & Co., a tract or several tracts of land situated now in the corporate limits of Danville, and which embraces the land in controversy, put them into the immediate possession, but did not make them a deed thereto until January 22, 1864, which was recorded December 11, 1865; that in the fall of 1863, W. W. Keen, by and with the consent of James M. Walker, sold a part of said property to Dr. T. D. F. Guerrant, to wit: that part lying between what was known as the Lower Ferry road, the Upper road, James Thomas' line, and Branch street, of the town of Danville, and so enclosed there, situate in the northwest corner of said town, as shown in the plat exhibited—and put him in the possession and occupancy thereof, receiving in payment therefor the full payment in tobacco and slaves, but made said Guerrant no deed of conveyance. They there set out an exchange of the 262½ acres purchased by W. W. Keen of Decatur Jones with Guerrant

Opinion.

for the lot above described, and say that all of said several transfers were known to and acquiesced in by James M. Walker; that said Decatur Jones had not made W. W. Keen a deed, nor was there any deed made to Keen by Walker at that time, nor by W. W. Keen & Co. to Guerrant, nor by Guerrant to Keen, it being in time of war when men could not transact business with customary regard to the requirements of law. But the payment of the purchase money was complete, and possession was delivered; that Keen directed Jones to convey title to the 262½-acre tract to Guerrant, which, as stated, was done by deed bearing date February 6, 1867, and recorded June 21, 1867, but that Guerrant had had possession since 1864; that on November 15, 1865, after Keen had taken possession of the land sold to Guerrant, and exchanged by him to Keen as administrator of James C. Moorman, deceased, and which possession was for the benefit of said estate, Walker conveyed to Keen his interest therein, and also his interest in several adjacent tracts, being all the property conveyed to W. W. Keen & Co. by E. F. Keen; that Keen took title in his own name for the reason given in the bill in cause No. 1, but contemporaneously advised his daughter, Nannie C. Moorman, and his family, and Decatur Jones and his wife, Harriet Jones, a sister of W. W. Keen, and Guerrant, and Walker, that at the time Walker conveyed said entire tract to W. W. Keen he had received largely over the \$30,000 he had paid Jones for the 262½-acre tract—indeed, he had received from the sales of manufactured tobacco belonging to the estate of his decedent alone net cash to the amount of \$83,921 88, and he therefore increased the amount of land he got of said Guerrant, and held for said estate all the balance of that so conveyed to him by Walker, and thus, from November 15, 1865, said W. W. Keen occupied and held, for the benefit of said estate of James C. Moorman, deceased, having exchanged for a part thereof the said Jones farm and received payment for the balance out of the said funds in his hands as administrator, the entire pro-

Opinion.

perty so conveyed to W. W. Keen & Co., and this he did openly and notoriously; that neither complainants nor their mother, nor her husband were made parties to the proceedings in bankruptcy, and that the record therein does not show any title to the property in controversy other or different from what is set forth in the statement in schedule "B 1"; that on January 15, 1868, the creditors of W. W. Keen, bankrupt, selected W. G. Banks and Charles L. Powell as trustees of the estate, which selection having been approved by the court, said W. W. Keen, by deed dated March 13, 1868, conveyed to said trustees "all his estate and effects absolutely, to have and to hold in the same manner and with the same rights in all respects as the said Keen would have had or held the same if no proceedings in bankruptcy had been taken against him"; that on June 1, 1869, said bankrupt conveyed to said trustees "each and all of the various lots, tracts and parcels of land, whether lying in the town of Danville, county of Pittsylvania, or State of Georgia, which were listed or surrendered by the said Keen in said schedule in bankruptcy, wherein a more particular description thereof will be found"; which deed was duly recorded in the clerk's office of the hustings court of Danville; that on December 4, 1869, W. G. Banks and J. D. Coles, as special commissioners, were ordered to sell the said real estate of said bankrupt, including "house and a tract of land of about ninety acres, to which it attached a ferry over Dan river, in Pittsylvania county, Virginia"; that January 14, 1870, an order was made to the same effect, and February 25, 1870, John A. Herndon divided said tract of land into eighteen lots, aggregating 91 acres and 56 poles, and returned a plat to said commissioners. On March 1, 1870, the sales were made, after due advertisement, were reported to court November 15, 1870, and December 3, 1870, duly confirmed; that the purchase money has all been paid, and title conveyed, and that the original purchasers have sold and resold and subdivided the land until the names of the present owners are numberless, and

Opinion.

many of them cannot be discovered; that some time in 1884 complainants brought suit to recover a lot of land, of which their father died seized, and advised their counsel that they had heard vague rumors that they were entitled to other lands somewhere in Danville, and employed said attorneys to represent them in all matters concerning their father's estate; that in 1886 said attorneys were examining a title to a lot within the boundary of said property, and were employed to look through said W. W. Keen's bankrupt papers. They discovered the statement on schedule "B 1," and refused to pass the title. They then advised complainants of their discovery, who were thus for the first time informed of their rights in 1886; that the purchase of Decatur Jones and the exchange with Guerant were made when there were only two judgments docketed against W. W. Keene, aggregating, principal and interest, \$2,000, and that these were liens upon other lands of Keen, and did not bind either the 262½ or the 92½-acre tracts, and were satisfied and paid out of other lands of said Keen; that the facts detailed constituted W. W. Keen a trustee for complainants and their mother, and they set forth what they conceive to be the respective interests of themselves and Dougherty, the husband of their mother, in the land; that by the bankrupt act the 92½ acres did not pass, and could not have passed under the control and jurisdiction of the district court, and that neither of the deeds referred to carried said property to the trustees of W. W. Keen, bankrupt; that said district court had no jurisdiction to order the sale of said land, or any part of it, and that the sales and conveyances made under its orders were void; that the purchasers were advised of complainants' title fully and absolutely by said proceedings and records; that complainants were infants at the date of the sales, and while they had heard hints from members of W. W. Keen's family that the said 92½ acres of land belonged to, and should have been conveyed to them, they never knew that they had any chance to recover the same until within a few months past;

Opinion.

that W. W. Keen is dead, and the legal title to said land is outstanding in his heirs. In cause No. 2 the bill undertakes to meet the matters of defence relied on by the defendants in cause No. 1. And they say that the defendants who are named, and those made defendants as unknown parties, are in possession of parts of the said land which was sold by W. W. Keen & Co. to Guerrant, and by him exchanged to W. W. Keen for the estate of Moorman, lying between the lower Ferry road, the upper Ferry road, James Thomas' line, and Branch street, and derived title under direct or *mesne* conveyance from Banks and Coles, commissioners as aforesaid, thus confining their claim to that portion of the 92½ acres embraced within the boundaries aforesaid; that at the time of the investment of the personalty into land Nannie C. Moorman was discovert, and knew thereof and assented thereto; that when she intermarried with Dougherty her interest was an equitable estate of one-third in the realty; that upon the birth of a child Dougherty became tenant by the curtesy initiate in said one-third, which, upon the death of his wife, became an estate by the curtesy consummate. They conclude by making all who are known to be interested parties defendant, but waive answers under oath; ask that an inquiry be had as to the unknown claimants, and pray that all deeds and conveyances be set aside; that a deed be made to them to said property; that they be paid and reimbursed for the rents and profits, and for general relief. The infant defendants answer by guardian *ad litem*. The administrator *de bonis non* of W. W. Keen, deceased, files a formal answer, and his heirs-at-law disclaim all interest in the subject matter of litigation. James M. Walker and T. D. F. Guerrant, who were not originally made defendants, but were brought in subsequently without formal amendment, plead their discharge in bankruptcy in bar to any liability that may be sought to be fixed on them, and pray to be dismissed. Many of the defendants do not answer, but quite a number demur and answer. Some deny that the lots owned by them

Opinion.

are within the boundary of the land sought to be recovered in cause No. 2. Some content themselves with a denial of complainants' claim, and insist that they are *bona fide* purchasers for value and without notice, while others make full and specific answer to the various allegations of the bills, and set out fully their several grounds of defence. They admit the death of James C. Moorman; that his heirs and next of kin are correctly named; the intermarriage of his widow with Dougherty; the birth of a child by that marriage; its death in infancy, and the subsequent death of the mother; that W. W. Keen qualified as the administrator of the estate of James C. Moorman, deceased, and gave bond as alleged, but they deny assets to the amounts claimed; and, from information, say that the assets of the estate which came to the hands of the administrator were converted into Confederate money, and perished with the downfall of that Government. They deny all knowledge of conversations between Keen and his partner, James M. Walker, or that the former ever contemplated investing the money of the estate in real estate. They deny that at the date of the alleged purchase by Keen of the 262½ acres of land from Decatur Jones that he had in his hands \$30,000, or any amount, belonging to his intestate's estate. They admit that E. F. Keen sold to W. W. Keen and James M. Walker, partners as W. W. Keen & Co., the property embraced in the deed from the former to the latter, dated January 22, 1864, (Exhibit "E. F. K."), but their knowledge is derived solely from the recordation of that deed. They deny all knowledge of the alleged sale to T. D. F. Guerrant, or of the alleged exchange, and deny that any of said transactions were had with W. W. Keen as administrator of Moorman. They insist that the "Jones" tract (so far as any money is proved to have been paid) was paid for with the funds of W. W. Keen & Co.; that the property now sought to be recovered was bought and paid for by W. W. Keen & Co.; that title was taken by them, and the property was so held until the disso-

Opinion.

lution of the firm and a division of its property; that the firm existed from 1861 till late in 1865, and during its existence became possessed of several parcels of land in Danville and Pittsylvania county; that in the fall of 1865 the real estate was divided between the partners, two parcels were released in severalty to Walker by Keen and wife, and about the same time Walker and wife released to Keen their interest in the remaining two parcels of land owned by the firm, and Keen and wife also released to Walker and W. W. Clarkson their interest in a parcel of land owned by the firm composed of Keen, Walker & Clarkson, and they insist that the land so set apart and conveyed to W. W. Keen, was as his individual property, and was so held, used, and occupied by him until he surrendered it in bankruptcy. They deny that Keen paid for either the "Jones" tract or the "Tunstall" tract with the money of Moorman's estate, and insist that if he ever had intention of conveying or holding it for the benefit of that estate, he neglected it until the rights of others had attached, and he had no power to do so. They admit the bankruptcy of Keen; that he listed the property in controversy, and that he made the declaration in regard to it on schedule "B 1" given above, but they deny the truth of the facts stated therein. They admit the execution of the deed by Keen to Banks and Powell, his trustees in bankruptcy, but deny that they refer to the schedules in bankruptcy for a description of the property, or that it was necessary for them so to do. The bankrupt's property devolved upon his trustees by operation of law, and the deed did not confer upon them any other or greater rights, but merely designated the persons to carry into effect the purposes of the bankrupt act. They admit that neither complainants nor Mrs. Dougherty were technically made parties to the bankruptcy proceedings, otherwise than by the aforesaid declaration of the bankrupt, and say they know of no other way in which they could have been made parties, unless some one had filed a petition for them; that all necessary steps were

Opinion.

taken in said matter to ascertain the rights of all lienors and other parties, and to secure a free and unincumbered sale of the lands of the bankrupt. But that neither in said proceeding or elsewhere were any steps taken to establish the pretended claim of complainants, or to maintain as true the *ex parte* declaration of their grandfather and trustee, W. W. Keen, on schedule "B 1," until these suits were instituted, long after his death. Later on, when it became necessary to estimate the contingent right of dower of the bankrupt's wife, he treated said land as his own, and included it in the deed in which his wife relinquished her right of dower in the lands. The claim for commutation was brought about by Keen, and the land in question formed the chief portion of the estate taken into said estimate, and he succeeded in having settled upon his wife one of the most valuable houses and lots in Danville, and he knew that if his declaration in schedule "B 1" was true his wife had no color of claim to dower in said land. The declaration was made when it seemed probable that it might have the effect of securing to his grandchildren a part of the property which would otherwise go to his creditors. But when the truth of the statement would have deprived his wife of property which was settled to her use, and afterwards jointly enjoyed by her and her husband, it was not brought in any manner to the attention of the court or of any of the parties to the proceedings; that Keen was present at the sale of the property, but did not then, or at any other time, intimate that complainants of any one else had any claim to the property whatever; that there were judgments against E. F. Keen, which attached to said property while owned by him, and passed to W. W. Keen & Co., who had notice, with said liens upon it, and that the judgments against W. W. Keen also attached, and were liens thereon; that subsequently to the conveyance of said land in severalty to Keen by Walker, Keen became a bankrupt, and the lands, subject to the liens aforesaid, passed, by operation of law, to his assignees or trustees; that the judgments against

Opinion.

him were more than sufficient to consume all the lands surrendered by him in bankruptcy; that the lien creditors instituted a suit in the circuit court of Pittsylvania county to subject said land to the payment of their debts; but upon the application of the trustees in bankruptcy, and some of the creditors proceeding in said suit were stopped, and the district court assumed jurisdiction, and convened said creditors before it. Afterwards an account of liens on the real estate of said bankrupt was duly taken, and said lands regularly and duly decreed to be sold for the satisfaction of the liens upon the same; that W. G. Banks and J. D. Coles were duly and regularly appointed by a decree of said court to make sale of said lands, and in pursuance of said decree, did advertise and sell the same; that the creditors of E. F. Keen, as well as W. W. Keen, were duly convened before said court, and made parties, and said sales were duly reported and confirmed, and deeds directed to be made to the purchasers on the payment of the purchase money; that the purchase money was afterwards fully paid and conveyances made to the respective purchasers; that there was no other property from which the liens, to satisfy which the land was sold, against which said judgments could have been enforced, and said judgments were the first liens on said lands; that they had no notice or knowledge, in any manner whatsoever, of any claim of complainants, or of Mrs. Dougherty, or of the estate of James C. Moorman, deceased, to said land, or any part thereof, or of the declaration made by the bankrupt on schedule "B 1"; that they are *bona fide* purchasers claiming under a decree of a court of competent jurisdiction of the subject-matter of the suit, and that their title is free and clear of the alleged secret trust asserted by complainants; that the purchasers at the bankrupt sale acquired not only the title of the bankrupt, but also the title of E. F. Keen, and that they, and those claiming under them, are entitled to hold said lands by the same right that the judgment creditors, who were parties

Opinion.

to said matter in bankruptcy, or convened before the court, might have asserted against the said lands, and received the title which might, in any event, have been lawfully subjected to said judgments, and are not responsible for the application of the purchase-money by the court; that the declaration of the bankrupt on schedule "B 1" was merely an *ex parte* statement, not regularly or formally a part thereof, and not such an assertion of the claim of complainants as would bind purchasers of the land without actual notice of the same; that the declaration does not contain such a description of the lands claimed to have been purchased on behalf of complainants as is sufficient to have warned purchasers, who had no notice of the occupancy of the land by Guerrant, that it was the same land derived by W. W. Keen from E. F. Keen, or to have put them on inquiry as to the truth of the facts therein stated, unless said purchasers had had notice that said land had been occupied or owned by Guerrant; that the interest of complainants, if any they had, were represented by W. W. Keen, their trustee, and he being a party to the bankrupt proceedings, they are barred thereby, although not technically parties themselves; that the matter is *res adjudicata*, and the action of the bankrupt court cannot be collaterally attacked; that complainants' claim, if any they had, is adverse to the trustees in bankruptcy, and, not having been prosecuted within two years, is barred by the limitation prescribed by the bankrupt act; that said claim is barred by the fifteen years' limitation; that the alleged claim of complainants, if any they have, is not a claim to the land, but to the funds which they allege were invested in land, and that the claim accrued to Moorman's administrator, and not to complainants; that the estate was insolvent, and complainants at the time had no real interest in the land; that the funds of the estate belonged to the administrator for the benefit of the creditors, as well as the heirs and next of kin; and, though it may not have been known at the time, it has been subsequently shown that the estate was wholly

Opinion.

insolvent, and the claim is barred by the statute of limitations, because the administrator failed to institute suit for the recovery of the same within five years; that the lapse of time and *laches* of complainants, if not barred otherwise, should preclude them from setting up the claim they now make. To sustain their contention that there were no assets of the estate of Moorman to invest in land, to show that the estate was insolvent, and the declaration of Keen, in schedule "B 1," was untrue, they refer to the record in the creditors' suit of *Soyars and others v. Moorman's Administrator and others*, brought in Pittsylvania circuit court in 1872, in which the administrator, Keen, was examined as to what became of the property of his intestate, and stated that it was lost by the results of the war; that the real estate of Moorman was sold, and the proceeds applied to the payment of his debts, leaving large amounts still due and unpaid. They also refer to the suit of complainants against R. W. Lawson to show that the contention of complainants there is inconsistent with the claim asserted by them here.

The last-named case is reported in 85 Virginia, 880, but the admissibility of the record referred to is excepted to by complainants, and, from the view I take of these causes, need not be noticed further.

From the foregoing summary of the contents of complainants' bills it will be observed that their contention is that the 262½ acres of land, known as the "Jones" tract, was purchased by W. W. Keen as administrator of their father's estate, and with its assets, and for its benefit, as an investment; that this tract was afterwards exchanged by said administrator with T. D. F. Guerrant for the "Tunstall Hill" property, also for the benefit of said estate, and that while the legal title to said property was taken in the name of W. W. Keen individually, a resulting trust nevertheless arose for the benefit of the estate; that the property was afterwards listed by Keen in his schedules in bankruptcy, but with the declara-

Opinion.

tion of the trust aforesaid written thereon, which affected the purchasers of the property under the proceedings in bankruptcy, and all claiming title through or under them with notice. It will also be observed that the answers deny the existence of the trust, or, if it existed, that the defendants had either actual or constructive notice of it. Before considering these questions, upon which, in my judgment, the causes hinge, it will be proper to notice some of the other points which have been raised and discussed.

It is argued that if the claim of complainants be true—that the trust existed; that the bankrupt court never acquired jurisdiction either of the property or parties, and that the sales under its decrees were nullities—complainants had a full and complete remedy at law, and should have proceeded by action of ejectment, and that this court has no jurisdiction of this controversy, it is sufficient to say that the title of complainants, if any they have, is equitable, not legal, and that they seek to set up and enforce a trust of which a court of equity alone has jurisdiction.

Again, the question, “For whose benefit did the trust result?” has elicited much discussion, the contention of the defendants being that it resulted, if at all, to W. W. Keen as administrator of J. C. Moorman, deceased, or to the creditors of his estate. It would seem clear that neither position is tenable. The administrator, by converting the personalty into real estate, put it beyond his reach, and the creditors can in no sense be said to have title either to the personal assets or their product. Theirs was a mere right to subject it to the payment of their debts; nothing more. They might, by proper process, have reached the personalty in the hands of the administrator before conversion, and had it applied in discharge of their debts, or, after conversion, they might have proceeded against the administrator and his bondsmen, and held him and them re-ponsible for his *devastavit*; or they might have followed and subjected the property into which the personalty was converted,

Opinion.

through the medium of a court of equity, to the payment of their debts. But under no conceivable circumstances would the title either to the personalty or realty, by operation of law, devolve upon them. If the personalty had not been converted, subject to liability for payment of debts, it would have passed to the widow and children of the decedent in the proportion of one-third to the former and the residue to the latter. And surely it cannot be maintained that the relations and rights of these parties, *quoad* the property in which the personalty was invested, were changed or altered by the conversion. It is earnestly insisted that the questions upon which this court is asked to pass have been adjudicated by the district court of the United States for the district of Virginia, *in re*, W. W. Keen, bankrupt; that the decrees and orders of that court, whether right or wrong, are final and conclusive, and constitute an absolute bar to the claim which complainants are now prosecuting and seeking to enforce here. Whilst this has been the "bloody ground," as I may say of the case, and counsel have shown much learning and research in its discussion, it seems to me to lie within narrow compass, to depend upon principles, the justness of which must be allowed, and is of easy solution. I take it to be a fundamental principle of law, requiring no citation of authorities to sustain it, that in order for the decrees of a court, of either special or general jurisdiction, to be binding (unless in pure proceedings *in rem*) two things are necessary: It must have jurisdiction of the person and of the subject-matter. The rule is founded upon principles of reason and justice, and the instances in which it has been violated have met with the unqualified disapproval and condemnation of the courts. In *Underwood v. McVeigh*, 23 Gratt., 418, Christian, J., in delivering the opinion of the court, said: "The sentence of condemnation and sale was a nullity—void *in toto*. It was rendered absolutely void by the act of the court in refusing to permit McVeigh to appear and be heard. The authorities on this point are overwhelming, and the deci-

Opinion.

sions of all the tribunals of every country where an enlightened jurisprudence prevails are all one way. It lies at the very foundation of justice that every person who is to be affected by an adjudication should have the opportunity of being heard in defence, both in repelling the allegations of fact and upon the matter of law, and no sentence of any court is entitled to the least respect in any other court, or elsewhere, when it has been pronounced *ex parte* and without opportunity of defence, an examination of both sides of the question, and deliberation between the claims and allegations of the contending parties have been deemed essentially necessary to the proper administration of justice by all nations and in every stage of social existence." (See, also, Robinson's Pr., 7th Vol., page 52, and *Ray v. Noseworthy*, 23 Wall., 136.) Now, while it may be difficult in every case to answer the query of one of the learned counsel for the defendants, *arguendo*, as to "who are parties to a proceeding in bankruptcy," it is very clear that complainants were not in the matter of W. W. Keen, bankrupt. There is no evidence or even pretence that they ever appeared, either in person or by counsel, or that any process or notice from the bankrupt court ever emanated against them, by publication or otherwise. This is virtually conceded; but the contention is that they were represented by W. W. Keen, either as administrator of their father's estate, or as their trustee. He cannot be said to have been a party in either capacity. He was a party for the purpose of obtaining a discharge from his debts, and for none other, and was discharged June 4th, 1869, as administrator. As has been stated, his power over the subject-matter ceased when he converted the personal assets of his intestate into real estate. Both as administrator and trustee, his interest was adverse to that of complainants. It would have been a case of committing the lamb to the care of the wolf. He would have had to play the double role of plaintiff and defendant at the same time. But I do not understand that the doctrine of representation applies in Virginia between

Opinion.

trustee and *cestui que trust*, so as to hold the latter concluded by decrees in cases in which the trustee is a party, but the *cestui que trust* is not. (Sands' Suit in Eq., page 197; *Richardson v. Davis and Wife*, 21 Gratt., 706.)

The extent to which the bankrupt court acquired jurisdiction over the subject matter of this suit, and the effect of its decrees in relation thereto upon complainants, will be considered later on and in a different connection; but the fact that said court had no jurisdiction of complainants, deprives said decrees of the effect claimed for them by the defendants of having adjudicated the rights sought to be litigated here, and of *per se* constituting a bar to complainants' claim. The defendants further claim that complainants' suits are barred by the acts of limitations prescribed by section 5057 of the Revised Statutes of the United States, which declares that "no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferrable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee." It will be observed that this section in terms applies only to suits by or against an assignee. The assignee in bankruptcy of W. W. Keen is not a party to these suits (nor am I prepared to say he is a necessary party), and the limitation, therefore, does not apply. Nor does the fifteen years' limitation prescribed by the Virginia statute operate as a bar to the suits. W. A. Moorman, the eldest son of J. C. Moorman, deceased, became of age October 15, 1877, and cause No. 2 was brought April 25, 1887, within less than ten years after he obtained his majority. It is also insisted that complainants have been guilty of such *laches* and delay in asserting their claim as should preclude them from recovery in a court of equity. They were informed of the facts upon which they base their right to recover, by their counsel, in April, 1886, and, as has been seen, the second suit was brought

Opinion.

about one year thereafter, while the first was brought within seven months, and it is not shown that the defendants have been put to any disadvantage by loss of evidence or otherwise in the interval of time that elapsed between the reception of the information and the institution of the suits. "It is well settled that *laches* cannot be predicated of those who are ignorant of their rights. Such a defence is, in equity, only permitted to defeat an acknowledged right on the ground of it affording evidence that the right has been abandoned. Acquiescence cannot be imputed in the absence of all knowledge of the facts of which it is predicated." *Rowe v. Bentley*, 29 Gratt., 763; *Lamar's Ex'or v. Hale*, 79 Va., 164.

"Estoppel from acquiescence," said the Court of Appeals in *Green's Adm'r v. Thompson, jfc.*, 84 Va., 411, "must rest upon actual knowledge of the wrongful act, its injurious effects, and unreasonable delay." (See, also, *Tunstall's Adm'r v. Withers*, 86 Va., 892, and *Pomeroy's Eq. J.*, 2d vol., § 817.) The case affords no ground for the application of the equitable bar arising from *laches*, acquiescence, and lapse of time; but what has been said on this subject applies only to the alleged claim of complainants as heirs and distributees of James C. Moorman, deceased, and not as claimants through their mother. The case stands on a wholly different footing as to Mrs. Moorman's interest. She was fully apprised of all her rights from the first—when she was discoverd, in the lifetime and before the bankruptcy of W. W. Keen, and no valid excuse is offered for her failure to prosecute her alleged rights. If the contention of complainants be true, all that was needful was a request that her father and trustee, W. W. Keen, execute the trust in him for the benefit of herself and children, and had he refused she was armed not only with such evidence as has been adduced here, but with her own and her father's, the chief actor in the drama, to sustain her. "She was silent when she ought to have spoken, and she will not be heard to speak when she ought to be silent." The converse of the doctrine laid down

Opinion.

in the cases of *Rowe v. Bentley*, 29 Gratt., 763, &c., cited above, applies with full force to the claimants of the alleged interest of Mrs. Moorman, and if no other defence save that of *laches* was interposed it would defeat a recovery. Having noticed briefly the several special defences relied on by the defendants, we come now to consider the two main questions in the case:

1st. Is the resulting trust, as set forth in the bills, established? and—

2d. Are the defendants *bona fide* purchasers for valuable consideration and without notice?

We will consider these in the order stated. It is contended that W. W. Keen first declared the trust sought to be enforced in 1863, and the evidence chiefly relied on to prove his declarations is that of James M. Walker and T. D. F. Guerrant. As an objection is raised to the competency of these witnesses, that question must first be determined. It is contended that they are parties to this suit; were parties to the original transactions, and participated in, and by their co-operation enabled Keen, the administrator of Moorman, to commit the *devastavit*, and would be liable over to the defendants in the event of a recovery by complainants, and further, that Walker is responsible in his warranty of title in his conveyance to Keen.

It will be remembered that Walker and Guerrant were not originally made parties to these suits; but, upon the filing of the demurrer of Bethell, it was suggested that they were necessary parties, and at the June term, 1889, they were made parties without objection. The court at that time was unacquainted with the record, and, acting upon the statements at bar, admitted them as parties without any consideration as to the necessity for so doing. At the January term, 1891, they filed disclaimers, and set up their discharges in bankruptcy in bar of any liability that might attach to them, and moved that the bills be dismissed as to them. The court, still not having examined the records, and not being sufficiently acquainted with their contents to pass intelligently upon the question, had

Opinion.

the motion noted, but postponed action upon it. No relief is sought in these suits against either of said defendants; but, on the contrary, the complainants are thoroughly committed to the pursuit alone of the property into which they allege the assets of their father's estate were converted. Nor is it clear that the bills could have been so framed as to have attempted the pursuit of the property involved, and of Walker and Guerrant, by reason of their alleged participation in the *devastavit* of Keen, without being open to the objection of multifariousness. I can conceive of no other reason for making them parties, save to exclude their testimony already taken in cause No. 1, and to prevent their examination in cause No. 2. It is by no means plain that their connection with the transaction was of such a character as to render them responsible to complainants originally, or to the defendants by way of subrogation in the event complainants should prevail. But they rely upon their discharges in bankruptcy, as above stated. (See on this subject *Neal v. Clark*, 95 U. S. R., 704, and, as to their competency, authorities cited in Mr. Christian's note.) Their liability, if any, is too contingent and remote to render them incompetent as witnesses. The exception to their competency should be overruled, and their motion that both bills be dismissed as to them should be sustained.

It is properly conceded that a resulting trust may be established by parol evidence. The authorities are all to that effect. It is also true that if a trust be impressed upon one piece of property, which is afterwards exchanged for other property, the trust follows, and the latter is affected with the same trust. *Cock v. Lullis*, 18 Wall., 342; *Overseers of the Poor v. Bank of Va.*, 2 Gratt., 551; *Tabb v. Cabell*, 17 Gratt., 160; *Oliver v. Piatt*, 3 How. 485; *Cook v. Wallace*, 18 Wall., 341. But it is equally as well settled that the evidence to establish the trust must be clear, cogent, and explicit. *Dyer v. Dyer*, Leading Cases, 335, 338; *Miller, &c. v. Blose's Ex'or*, 30 Gratt., 747; *Jennings v. Shackett*, 30 Gratt., 765; 1 Perry on Trusts, sec.

Opinion.

127; Sugden on Vendors, 708: *Phelps v. Seeley*, 22 Gratt., 529. And the trust must be proved as alleged. *Dyer v. Dyer*, *supra*, citing *Andrew v. Fontaine*, 2 Stockton's Ch'y R., 91. It will be observed that to establish the trust complainants rely wholly upon the declarations of W. W. Keen as made to Mrs. Jones, T. D. F. Guerrant, and James M. Walker, and the circumstances. (I allude now to the declarations alleged to have been made in the fall of 1863, and not to that written on Schedule "B 1," which will be noticed later on.) It will be remembered that the bill in cause No. 1 charges that the "Jones" tract was exchanged by Keen with Guerrant for all the property embraced in the deed of January 22, 1864, from E. F. Keen and wife to W. W. Keen & Co., embracing not only the "Tunstall Hill" property, but also the lower ferry over Dan river, with the land attached, amounting in all to 92½ acres. While all the evidence shows that W. W. Keen & Co. only sold Guerrant a part of this property, witnesses varying in their opinions, as to how much, though the weight of evidence would seem to show sixty-odd acres.

In cause No. 2, in the light of evidence taken in cause No. 1, the charge is that the "Jones" tract was exchanged with Guerrant for the sixty acres, but that W. W. Keen, finding himself largely indebted to the Moorman estate as its administrator, elected to hold the residue of the 92½ acres, having bought out the interest of his partner, Walker, therein in trust for that estate. It may be remarked in passing that there is not a particle of evidence to sustain this allegation, and attempt to reconcile the discrepancy in the bills, and to sustain the declaration of Keen in Schedule "B 1." The witnesses—Mrs. Jones, Guerrant, and Walker—testify as to the declarations alleged to have been made nearly a quarter of a century before, when war was flagrant, and men's minds so disturbed by passing events and the condition of the country that they ceased to apply customary business methods to transactions of vital importance—*e. g.*, Guerrant purchased the "Tunstall Hill"

Opinion.

property, for which he paid ———, investing his all, slaves and tobacco therein, and took no conveyance. He afterwards, in 1864, exchanged this property for the "Jones" tract, and obtained no title until February 6, 1867.

Mrs. Jones was surrounded by a family of eleven helpless children, which absorbed her attention, while Walker, a man of large affairs, was engaged in manufacturing tobacco, banking, farming, trading in lands, negroes, &c., and operating in a territory extending from Virginia to Georgia. It is proper to look to the surroundings of these witnesses with the view of determining the weight to be attached to their recollection of a transaction which did not particularly concern them, and to which they speak twenty-odd years after the fact. It is, therefore, not surprising that we find their statements, as to what Keen's declarations were, variant and irreconcilable. Mrs. Decatur Jones, the sister of Keen and great aunt of complainants, was examined in both cases—the first time, December 21, 1886; the second, September 30, 1887—and yet, upon the second examination, she remembered nothing and would swear to nothing. In her first deposition she proves the sale of the "Jones" tract to Keen, but at what time she cannot say "to save her life." She says the consideration was \$25,000 or \$30,000 in Confederate money; that she received the last payment, \$5,000, herself (the charge is that it was a cash sale); that it was paid to her in bank notes at the residence of Mrs. Holcombe, in Danville, by "Jim Walker." She says her brother, W. W. Keen, afterwards asked why she got after Walker about this money; that it was the last payment and he had intended to make them wait for it. Walker, on the contrary, says: "My recollection is, in the spring of 1864, or early in the year 1864, W. W. Keen requested me to pay Mrs. Decatur Jones \$5,000, and I gave her the check of W. W. Keen & Co. for that amount. About the time this check was given W. W. Keen informed me that he owed \$5,000, balance on the purchase of the Decatur Jones land, and requested me

Opinion.

to give the check, and I charged it to his individual account on the books of W. W. Keen & Co." In his second deposition he says prior to the payment of the \$5,000, W. W. Keen asked him to make it, and that he gave Mrs. Jones the firm-check in the office of their tobacco factory on Bridge street. Now, it will be observed that about this transaction, every whit as likely to have fastened itself upon their memories as the declarations of Keen, these two witnesses contradict each other throughout. Mrs. Jones says the payment was in bank notes at Mrs. Holcombe's, and that Keen chided her for "getting after" Walker about it. Walker says the payment was by the check of W. W. Keen & Co., made in the office of their factory, and at the request of Keen. They not only contradict each other, but both contradict the charges of the bills and the written statement of Keen that he bought the "Jones" tract "for the sum of \$30,000 in Confederate money, which he paid in cash and with money arising from the sales of tobacco belonging to said estate." All that Mrs. Jones can be induced to say looking to the establishment of a trust in the "Jones" tract, though hard pressed by counsel, is: "I do not like to say, because I cannot recollect well enough to take an oath. I always understood that he (W. W. Keen) bought it (the "Jones" tract) for Nannie Moorman," and they made the deed to Guerrant, because she understood that Keen had swapped the "Jones" tract to him for the "Tunstall Hill" property, but she was not present.

In answer to the direct and suggestive question: "Did Mr. Keen ever state to you that he bought this property for James C. Moorman's estate?" She answers: "It has been so long I would not like to swear to that effect." She proves no declaration of trust by Keen. Dr. Guerrant is also examined in both cases. He proves his purchase of the "Tunstall Hill" property from Keen & Walker in the fall of 1863, and thinks he held it until the fall of 1864, when he exchanged it with W. W. Keen for the "Jones" tract. Keen gave him as a

Opinion.

reason for the swap that he wanted it for his daughter, Mrs. Moorman; that she was a widow, and he did not want her exposed on that farm in the country so far from him, because it was located and surrounded in a community which was largely negroes, large negro quarters, and, during war times she would have no protection. "That commenced the trade; was the opening, preparing our minds for the trade. * * * And in the same conversation he stated he had purchased the 'Jones' tract for his daughter, Mrs. Moorman." This conversation was in 1864. He was first examined February 2, 1887, and his second examination September 30 of the same year, is substantially the same. In point of fact, Mrs. Moorman never lived either on the "Jones" tract or the "Tunstall Hill" property, but her husband owned a residence in Danville, which was sold years after the war in the suit of *Soyars, &c., v. Moorman's Heirs, &c.*, on February 24, 1887.

James M. Walker was first examined, and says: "To the best of my recollection, in 1863, W. W. Keen had frequent conversations with me in regard to the investment of some money that he held belonging to the estate of James C. Moorman, deceased, and my recollection is that some time after the frequent conversations he informed me that he had purchased a tract of land from Decatur Jones for the estate of James C. Moorman, deceased. My recollection is that this information was given me in 1863. I can't say what time I advised him, but it was prior to the purchase of the property from Decatur Jones. I don't think he held it (the "Jones" tract) very long. W. W. Keen informed me that he had traded the Decatur Jones property with Dr. T. D. F. Guerrant for the Tunstall property. I think this transaction was in the latter part of 1863. I know the trade was made, and Keen took possession of the Tunstall property after that."

In answer to question 12: "Do you know whether W. W. Keen, prior to the summer of 1864, received any moneys as administrator of James C. Moorman, deceased"? He says:

Opinion.

"My recollection is that I was one of the appraisers of James C. Moorman's estate; that he had considerable quantity of manufactured tobacco, leaf tobacco, and other personal property, and that W. W. Keen realized money for the sale of that tobacco, and I think that this was prior to the summer of 1864." "I think the date of the purchase of the 'Jones' farm was early in the fall of the year 1863."

In answer to the question, if he knew to what end or purpose Keen held the "Tunstall Hall" property, he answers: "I do know, and derived my information from W. W. Keen. My recollection is that in the latter part of the year 1863, or early in the fall of 1863, W. W. Keen informed me that he had exchanged the Decatur Jones tract of land with Dr. T. D. F. Guerrant for the estate of James C. Moorman, deceased."

He was again examined September 30, 1887, and says: "As stated before, W. W. Keen consulted me as to how he should invest this money belonging to the estate of J. C. Moorman, deceased, and did inform me that he had made the purchase of the "Jones" tract of land for the estate of J. C. Moorman, deceased. I don't recollect that he had any special reference to any special money that he purchased it with Moorman's estate, or any other money."

The foregoing are extracts from the depositions bearing directly upon the point under discussion. Can it be fairly predicted of them that they clearly and explicitly establish the charges of either bill? They show that only a part of the 92½-acre tract, claimed to have been exchanged by Dr. Guerrant with Keen for the "Jones" tract, ever belonged to him. Again, Mrs. Jones "always understood" (from whom it does not appear), that her brother, W. W. Keen, bought the "Jones" tract for his daughter, Mrs. Moorman. And Dr. Guerrant distinctly testifies that Keen told him he purchased it for his daughter, Mrs. Nannie Moorman, not for complainants, not for the Moorman estate, or with its assets, but for his daughter. Walker, with equal pertinacity of statement, says

Opinion.

Keen told him he was going to buy it for the Moorman estate, and afterwards that he had done so. Now, which of these statements is to be adopted? If the former, the trust resulted in favor of Mrs. Moorman, who knew of her rights and failing to assert them until the rights of others intervened, and those claiming under her are estopped from doing so now. It may have been laudable in her to remain silent and permit her father to hold, use and enjoy her property, and finally to surrender it in bankruptcy, rather than to assert her rights and be disowned by him; but she cannot visit the consequences of such a course upon the defendants. But is it incumbent upon a court to undertake to reconcile the serious conflict in the testimony, and to adopt that of Walker rather than of Mrs. Jones and Dr. Guerrant, and, too, against that justly favored class in equity, purchasers for value, and without notice? Or, if it be insisted that Keen made both statements, do his inconsistent statements furnish a safe guide to a mind in search of truth? Aside from these declarations the circumstances would seem to repel the presumption that the assets of the Moormans' estate paid for the "Jones" tract. The witnesses all agree that the purchase was in 1863, and, they claim, for cash. It is undisputed that Moorman died November 8, 1863, and that Keen qualified as administrator at the county court of Pittsylvania following (November 16th). There is no evidence that he left any ready money. To the contrary, Walker, one of the appraisers, testifies as to what the estate consisted of, and no money is mentioned; and, as has been seen, Keen, in his statement in schedule "B 1," says he had in his hands "large sums of Confederate money arising from the sales of tobacco belonging to the estate." The inference is a reasonable one, from the amount of the penalty of the administrator's bond, \$300,000, that the personal estate was estimated at half that amount. But it would be unreasonable and against experience that a personal representative, qualifying after the middle of November upon the estate of a decedent who left

Opinion.

no ready money, could have sold property and collected money sufficient to have made a cash purchase of land that year for \$25,000 or \$30,000 for the estate. The sale of tobacco, too, must have been after the inventory was taken, otherwise the money would have been inventoried in place of the tobacco. And yet we must conclude either that Keen did make sales and collections, as supposed, to sustain the theory that the "Jones" tract was bought and paid for with the money of Moorman's estate, for all the witnesses *una voce* locate the date of sale in the fall of 1863, and Walker early in the fall, which would make it antedate not only Keen's qualification but Moorman's death. The first moneys of the estate traced to Keen's hands were the \$12,000 paid him by Harvey, James & Williams, commission merchants, in May, 1864, months after the land was purchased and paid for, if the charge in the bills and the declaration of Keen on his schedules are true. But the last payment, as has been shown, was made by the \$5,000 check of W. W. Keen & Co. And, finally, after the close of the war, to wit, on November 15, 1865, W. W. Keen, when the matter was fresher in his mind than when he went into bankruptcy several years later, took a conveyance of the "Tunstall Hill" property to himself individually. Thus it would seem that the circumstances are not only not helpful in reconciling the conflict in the alleged declarations of Keen, but tend strongly to discredit the truth of any and all of them. "A mere parol declaration by one that he is buying land for another is not sufficient to establish a resulting trust, there must be some proof of an actual or constructive payment by the person claiming such trust." 1 Perry on Trusts, § 134. "Proof of mere admissions of one that he purchased for another, without proof of some previous arrangement or advance of money by such other, is insufficient to create a resulting trust." 20, § 138. "A resulting trust may be set up by parol evidence against the letter of a deed, &c., but the testimony to produce this result must in each case be clear and unquestionable. Vague and

Opinion.

indefinite declarations and admissions long after the fact, have always been regarded, with good reason, as unsatisfactory and insufficient." *Phelps v. Seeley*, 22 Gratt., 573. "The witness swears to no fact or circumstance capable of being investigated or contradicted, but merely to a naked declaration of the purchaser, admitting that the purchase was made with trust money. That is in all cases most unsatisfactory evidence, on account of the facility with which it may be fabricated, and the impossibility of contradicting it, besides the slightest mistake or failure of recollection may alter the effect of the declaration." Opinion of Sir William Grant in *Lench v. Lench*, 10 Ves., 511-518, quoted with approbation by Bouldin, J.; in *Phelps v. Seeley*, *supra*, and in *Bostford v. Burr*, 2 John Chy. Rep., 405, 11 Chancellor Kent, in commenting on the value of such testimony, says: "This is a remarkable instance of the inaccuracy and fallacy of parol testimony, and shows the great danger there is of giving much latitude to these implied trusts founded on naked declarations in opposition to the solemnity and certainty of written documents." See, also, *McKeenan v. McKeenan*, 33 N. J.; Eg. R., 384, and other cases cited by counsel for defendants to the same effect. A resulting trust must arise at the time of the execution of the conveyance. Payment of the purchase money at the time of the purchase is indispensable. A subsequent payment will not by relation attach a trust to the original purchase." *Beecher v. Wilson, Burns*, 84 Va., 813. Now it can hardly be said that the evidence in these causes measures up to requirement. But suppose it be conceded that the trust is established. It is not pretended that the defendants had notice of it, and to give it efficacy, it must be coupled on to a declaration of which they did have notice. For, says Christian, J., in delivering the opinion of the court in *Carter v. Allen*: "It is sufficient to say that it has been the uniform course of decision in this State, as well as the other States of the Union, to hold that the *bona fide* purchaser of a legal title is not affected by any

Opinion.

latent equity founded on a trust, fraud, or incumbrance, or otherwise, of which he had not notice, actual or constructive." 21 Gratt., 249, and cases cited.

The contention, however, is that this link is supplied by what is styled the "declaration of trust" on schedule "B 1" of Keen's bankruptcy proceedings, which it is claimed confirmed and corroborated the previous declarations, confirmed the purchase of the "Jones" tract for the Moorman estate and the payment of the purchase price with its assets, and confirmed the exchange of it with Guerrant for the "Tunstall Hill" property. I have considered the declarations of Keen alleged to have been made in 1863, without adverting to the objection made to their admissibility. They were made, if at all, while he was in possession of the property; were contemporaneous with the transactions, were made when he was solvent, and were against his interest. Declarations made under such circumstances are clearly admissible. *Dooley v. Baynes*, 86 Va., 644.

It is insisted that with the declarations of 1863 eliminated, complainants are still entitled to recover upon the declaration found on schedule "B 1." I prefer to discuss the effect of this in its various bearings under the head: 2d. Are the defendants *bona fide* purchasers for valuable consideration, and without notice? It is proved that they did not have actual notice of what was written on schedule "B 1." Did they have constructive notice? Reason and justice demand that we look at this question not in the light of after developments, but from the standpoint occupied by the defendants when they purchased, paid the purchase price, and took conveyances to the land in controversy. And what would the records have disclosed to a prudent, careful, and diligent examiner of the title? He would have found that the 92½ acres of land, including the ferry, composed of several parcels, was conveyed by L. M. Shumaker and wife to E. F. Keen by deed dated December 17, 1862; that E. F. Keen and wife conveyed it to W. W.

Opinion.

Keen & Co., a firm composed of W. W. Keen and James M. Walker, by deed dated January 23, 1865; that W. W. Keen conveyed to James M. Walker his interest in three pieces of property owned by W. W. Keen & Co., for the consideration of \$9,000, by deed dated November 15, 1865; and that Walker conveyed to Keen his interest in two parcels of land owned by said firm for the aggregate consideration of \$10,000, Walker's half interest in the whole of the property in controversy being conveyed by deed bearing date November 15, 1865, reciting a consideration of \$5,000, and that its purpose was to vest in Keen the entire title to that property which had before been jointly owned by him and Walker. There were five deeds from Walker to Keen, and each expressed on its face that the intention was to vest in Keen, as his individual property, the land which had been previously held by Keen and Walker as partners. In other words, they were nothing more or less than deeds of partition of the lands of W. W. Keen & Co. between the members of the firm. (In this connection it may be observed that this is not only a fair inference from the deeds themselves, but is proved by William Walker and virtually admitted by James M. Walker on cross-examination.) He would also have seen that these lands were heavily incumbered in the hands of E. F. Keen, W. W. Keen & Co., and W. W. Keen by judgments against E. F. Keen and W. W. Keen. He would have discovered the deed of March 13, 1868, from W. W. Keen to William C. Banks and Charles L. Powell, his trustees in bankruptcy, and that the land had been ordered to be sold by the bankrupt court to discharge the liens upon it. The record title was in all respects regular and perfect. The property appeared to be Keen's individually and in fee, and properly surrendered by him in bankruptcy, and regularly sold to pay incumbrances. Could he reasonably have been required to investigate further? The deed to the trustee is general in its terms, conveying "all his estate and effects," giving no particular description of the property embraced, and referring to

Opinion.

no other paper for a description. But the contention is that the deed from Keen and wife to the trustees of June 1, 1869, did refer to the lands "which were listed and surrendered by the said Keen in his schedules in bankruptcy, where a more particular description thereof will be found," and that the defendants were by this deed directed where to go for information about Keen's property. But the whole title, by operation of law and the first deed, had passed out of Keen, and, had the second deed undertaken to carry title, it would have been inoperative. *Evans v. Spurgin*, 6 Gratt., 118. But the second paper was in no proper sense a deed conveying Keen's property. He merely joined to make effectual his wife's relinquishment of her contingent right of dower; and, besides, there is nothing in the language employed, had the deed fallen under the eye of the examiner, to have led him to suspect that the schedules would make any disclosure as to title other than what the records, of which we suppose him to have been apprised, showed, but merely a "more particular description" of the property would have been found. So far from exciting suspicion, had any existed, the deed would have tended to allay it, for it was fair to presume it had reference to property belonging to Keen, and of which his wife would be dowable in the event of her surviving him, and not to trust property, in which neither was interested. If the declaration of Keen in schedule "B 1" is true, the land ought not to have been surrendered by him in bankruptcy, the assignees or trustees had no more right to it than if it had been an express trust declared in the most formal manner by deed or other written instrument, and it would have been no act of bankruptcy for Keen to have conveyed the legal title to the owners of the equitable estate. Section 5053, U. S. Rev. Stat. provides: "No property held by the bankrupt in trust shall pass by the assignment," and *Id.*, section 5016, provides what does pass, and what the inventory or schedules shall contain: "The said inventory must contain an accurate statement of all the peti-

Opinion.

tioners' estate, both real and personal, assignable under this title, describing the same and stating where it is situated, and whether there are any, and if so, what incumbrances thereon." Surely, then, this was no place for one to look to find, not only what was not required to be there, but what ought not to have been there.

The records had shown the purchaser that the property was Keen's, and how unreasonable and dangerous would be a rule that required an examiner to search for latent, hidden equities not in his line of title, and not in the proper receptacle for them, but when the law had solemnly declared they should not be, to falsify and nullify the record title. A purchaser cannot be deemed negligent for omitting to look for that which he cannot reasonably expect to find. *Le Neve v. Le Neve*, 2 W. & N. L. C., 121, 205; *Mott v. Clark*, 9 Barr, 400; *Siter, Price & Co. v. McClanachan*, 2 Gratt., 312, 313, and cases cited by defendant's counsel. While it is true, as has been stated, the decrees and orders of the bankrupt court did not *per se* constitute a bar to complainants' claim, as they were not parties, it is equally true that said court did have jurisdiction *sub modo* of the subject-matter of these suits. The legal title to it was in the bankrupt, and he embraced it in his inventory. If it was trust property, and had been legally made so to appear, the court would have had no jurisdiction, but the mere unsupported claim that it was trust property surely could not have had the effect of ousting the court of jurisdiction.

Suppose the lien creditors of a party indebted to insolvency were to file a bill to subject his real estate to the payment of their liens, and he were to set up affirmatively in his answer that while it was true he had contracted the debts upon which the judgments were based on the faith of the land, to which he had the legal title, and had possessed, used, and enjoyed it under said title as his own, nevertheless there was a secret, resulting trust in him for the benefit of his wife and children, or grandchildren, if you please, and later on, in the same proceedings,

Opinion.

he and the attorney, who prepared the answer were to admit that the statement was untrue, or did some act so totally inconsistent with its truth as to be tantamount to an admission that it was false, can it be believed that a court of equity would stay proceedings till the wife and children or grandchildren could be brought in by amendment and afforded an opportunity to prove a resulting trust in the land? And if the court were to proceed and sell the land to purchasers without notice of the unproved and subsequently falsified affirmative allegation of the answer, and confirmed the sale, collected the money, applied it in discharge of liens upon the land, and had title conveyed to the purchasers, could it be contended that the court would be ousted of jurisdiction, and its decrees be nullities? Surely the position could not be maintained, and yet the case put is the case under judgment stated differently. Let us suppose a case suggested by one of defendant's counsel, that the bankrupt had declared that all the property surrendered by him was bought with funds belonging to his wife, could it be seriously contended that the mere assertion of such a fact, wholly unsupported, would have divested the court of jurisdiction? It would seem plain that the court was not wholly without jurisdiction, as is contended, nor do I believe there was any obligation upon it to stay its hand by reason of the declaration made on Schedule "B 1." More particularly when it is borne in mind that Keen himself repudiated the statement, and made the property the basis of a claim for the settlement of valuable property upon his wife in consideration of her relinquishment of her contingent right of dower, and when counsel, who dictated the so-called declaration of trust, signed a consent decree for the sale of the land embraced in it to pay liens upon it. With what propriety could a court be asked or expected to give credence to a declaration thus discredited by client and counsel? As I understand the rule, declarations to be admissible must have been made when the party had no interest to make them. And surely this cannot

Opinion.

be predicated of Keen's declaration, made in favor of his grandchildren against his creditors, when he was not only insolvent, but in bankruptcy. *Ross v. Bank of Bennington*, 1 Aiken, 43; 15 Amer. Dec., 664; 1 Cowen & Hill's Notes to Phil. on Evidence, 644-5; *Padgett v. Lawrence*, 10 Paige Ch. R., 170; 40 Amer. Dec., 232; *Carpenter v. Hallister*, 13 Lmt., 552; 37 Amer. Dec., 612. It would be carrying the doctrine of the admissibility of declarations against title to a dangerous length to hold that of Keen admissible under the circumstance of this case. To do so, and maintain that it is sufficient to establish the truth of it and impress a trust upon property, would be to hold that every insolvent, unscrupulous debtor could shield his property from creditors simply by declaring a trust in favor of his family. It is believed that no respectable authority can be found to support a rule so unreasonable and so fraught with mischief. All that can be said of the proceedings and decrees of the district court is, that while not *per se* binding on complainants, because not parties, the court did acquire jurisdiction of the subject-matter of controversy, and passed the title to it to *bona fide* purchasers for value and without notice, actual or constructive, before their claim, if any they had, was properly and legally made to appear.

This opinion has been extended far beyond the limits of what was either intended or desired, but an apology will be found in the voluminousness of the record and the variety of questions involved. I am gratified that the law and evidence in the case are, in my judgment, in consonance with justice and equity. A decree will be prepared dismissing both bills with costs to the defendants.

DECREE AFFIRMED.

Richmond.

MICHAEL V. ROANOKE MACHINE WORKS.

FEBRUARY 1st, 1894.

1. EMPLOYEES—*Risks—Other perils—Warning.*—An employee's assumption of the hazards of his employment, does not extend to the hazards of a work of a different character to which his employer temporarily orders him. And in such case, he is entitled to rely on his employer's giving him proper warning of other perils unknown to him, and from which said work necessarily distracts his attention.
2. IDEM—*Negligent injuries—Case at bar.*—One, employed as a helper in defendant's boiler shop, was ordered to do a novel and engrossing work—that of emptying certain oil pans; and whilst sitting on a wall twenty-five feet high with his legs hanging over its side, and reaching down two and a half feet to empty the pans with his left hand, he had to hang for support, his right arm across an iron rail on top of the wall, on which moved on flanged wheels a huge crane propelled by an engine. When he started to do the work, the crane was stationary. He had to sit with his back to the crane, and was engrossed with emptying the third pan when the crane was set in motion, without warning to him, and passing over his right arm, crushed it. On demurrer to the evidence at trial of action for damages,

HELD:

The defendant company is liable, the injury being the result of its negligence, without contributory negligence on the plaintiff's part.

3. PRACTICE AT COMMON LAW—*Demurrer to evidence.*—If the court would not set aside the verdict so finding the fact, that fact should be considered as established by the evidence demurred to.
4. IDEM—*Argument.*—It was not improper to allow counsel in discussing the amount of damages, to state to the jury that, so far as they were concerned, the demurrer to evidence was a practical admission of negligence on the defendant's part.

Statement—Opinion.

Error to judgment of corporation court of city of Roanoke in an action of trespass on the case wherein B. K. Michael was plaintiff and the Roanoke Machine Works was defendant. The defendant company demurred to the plaintiff's evidence, and the jury assessed his damages at \$10,000, subject to the demurrer, which the court below sustained. The plaintiff brought the case here on error. Opinion states the case.

Hardaway & Payne, Staples & Munford, and Scott & Staples, for plaintiff in error.

S. Griffin and J. A. Watts, for defendant in error.

LEWIS, P., delivered the opinion of the court.

This was an action for personal injuries sustained by the plaintiff while in the employ of the defendant company as a helper in its boiler shop. At the trial the defendant, without offering any evidence, demurred to the plaintiff's evidence, whereupon the jury conditionally assessed the damages at \$10,000. The court, however, sustained the demurrer, and gave judgment for the defendant.

The injury complained of was caused by the crane, as it is called, being run against the plaintiff's right arm, which crushed it, and necessitated its amputation. The crane is a huge, ponderous machine used for moving engine boilers and other heavy weights from one place in the shop to another, the motive power being supplied by an engine. It moves on flange wheels which run on iron rails at either side of the shop. These rails are laid on walls about twenty-five feet high, and the axles of the crane consequently extend across the shop. The machinery of the crane, including the grappling hook, hangs under the axles, as does the cab, which is occupied by the operator of the crane. On the floor below several hundred men are employed, whose position, in consequence of the

Opinion.

swinging of the grappling hook when the crane is in motion, is one of danger, requiring the operator's constant attention.

The plaintiff testified that when he arrived at the shops the morning of the accident the fire in the engine that runs the crane had been extinguished; that some time afterwards he was ordered by the foreman of the boiler shop to empty certain pans which were fixed under the shafting to catch the waste oil; that this shafting is hung about two and a half feet below the track on which the crane runs, and that to enable him to empty the pans he had to sit down on the wall, with his feet and legs hanging over the side of it, then hang his right arm across the rail, lean forward, and with his left hand "reach down and take off the buckets." He also says that when he started to obey the foreman's order the crane was still stationary, and that after emptying two of the pans he looked and it was standing in the same position, about one hundred and fifty or more feet distant from him, but that while he was in the act of taking off the third pan "they ran the crane up, without any warning," and crushed his arm.

The pans were hung on wire, and "it took some time," he says, "to undo the wire." It seems that he had been engaged ten or fifteen minutes in attempting to unfasten the third pan, when the accident occurred; and as it does not affirmatively appear that this was an unreasonable time, the inference, on the demurrer to evidence, is that it was not. In the position he was in, which, he says, was necessary to enable him to remove the third pan, the crane approached him from the rear; and when asked to explain why this position was necessary, he answered: "Because it was a double pulley. They had a large pulley where the belt came through from the belt room, and it had a box on each side, and in order to take off the box on the eastern side I had to hang with my back to the crane and take it off with my left hand."

The plaintiff was employed as "a helper in the boiler shop to help boiler-makers." Nothing was said in the contract of service

Opinion.

about removing oil pans, and although he had been in the service about four months, when the accident occurred, he had never before been ordered to perform that duty. In other departments of the company's business there were men specially employed to do similar service, and since the accident a man has been employed for that special service in the boiler shop.

Usually the whistle is blown, as a signal, when the engine that runs the crane is started; and when the crane was started, immediately before the accident, the whistle sounded twice, but neither the plaintiff nor his companion, Lawhorne, heard it. This was, no doubt, owing to the great noise incident to the operations in the boiler shop, which is described by one of the witnesses as "deafening." Another says: "You can hardly hear yourself in there at all." The evidence, moreover, is that there is no signal for the starting of the crane, and that the running of the engine does not necessarily mean that the crane is in motion. The operator of the crane testified expressly that "there is no signal for moving the crane, and no one to look out for persons on the wall."

Counsel for the company assumed in the argument that the movement of the crane does not exceed a speed of one hundred feet in three minutes, but this assumption is not warranted by the record. The point, however, in our view of the case is not a material one.

The questions to be determined are: (1) Whether the defendant company was negligent; and (2) whether, if it was, the plaintiff was guilty of such contributory negligence as to defeat a recovery.

It is an undisputed rule of the common law that the servant, when he enters the service of another, impliedly assumes the hazards of the employment, including the negligence of fellow-servants. But this applied assumption is confined to those risks which are within, or naturally incident to, the employment. Therefore, if the servant is ordered to temporarily work in another department of the general business, where

Opinion.

the work is of such a different character that it cannot be said to be within the scope of the employment, he will not, by obeying such orders, necessarily assume the risks incident to the work. *Jones v. Old Dominion Cotton Mills*, 82 Va., 140; *Railroad Co. v. Fort*, 17 Wall., 553; *Pittsburg, &c., Ry. Co. v. Adams*, 105 Ind., 151.

It is not necessary, however, to rest the decision of the present case upon this principle. We think the plaintiff is entitled to recover, on the broad ground that it is the duty of the master to take ordinary care for the servant's protection, in the course of the employment, and that this has not been done in the present case.

In *Priestley v. Fowler*, 3 M. & W., 1, the earliest reported case on the subject, while it was held that the master was not liable in that case for injuries received by the servant in consequence of the breaking down of an overloaded van, yet it was laid down as an undoubted proposition that "the master is bound to provide for the safety of his servant in the course of his employment, to the best of his judgment, information, and belief." The same principle has since been repeatedly recognized by the House of Lords, by the Supreme Court of the United States, and by the courts of the several States of the Union. *Paterson v. Wallace*, 1 Macq., 748; *Hough v. Railway Co.*, 100 U. S., 213; *B. & O. R. R. Co. v. McKenzie*, 81 Va., 71; *R. & D. R. R. Co. v. Normont*, 84 Id., 167; *Richland's Iron Co. v. Elkins*, ante p. 249.

In the last mentioned case, after referring to this rule, it was added that the master is also bound, so far as he can by the use of ordinary care, to avoid exposing his servants to extraordinary risks, and that the failure of one who employs servants in a complex and dangerous business to prescribe rules sufficient for its orderly and safe management is negligence.

Accordingly, the servant has a right to assume, when placed in a situation of danger, where engrossing duties are required of him, that the master will not, without proper warning, sub-

Opinion.

ject him to other perils unknown to him, and from which the work exacted, necessarily distracts his attention. 14 Am. & Eng. Ency. of Law, 855. This was the principle of the decision in the *Norment Case*, *supra*; and, as is well stated in a recent Indiana case, another duty of the master is "not to expose an inexperienced servant, at whose hands he requires a dangerous service, to such danger without giving him warning. He must also give him such instruction as will enable him to avoid injury, unless both the danger and the means of avoiding it are apparent." *Atlas Engine Works v. Randall*, 100 Ind., 293.

These salutary rules, which are founded in justice and public policy, have been disregarded in the present case. Not only was there no warning or instruction given the plaintiff before he was ordered to perform the dangerous, and to him novel, duty of emptying the oil pans, but the crane was started and driven upon him, without any signal being given that he could hear, or any lookout provided, or precaution of any sort taken to warn him of its approach. The youth, Langhorne, who was with him on the wall at the time of the accident, was not ordered to accompany him as a lookout, but to hold a bucket for the waste oil to be poured into from the pans; and had he been sent as a lookout, any negligence on his part, while acting in that capacity, would have been the company's negligence. *B. & O. R. R. Co. v. McKenzie*, 81 Va., 71.

It is contended, however, that the plaintiff was guilty of contributory negligence in not looking out for his own safety; and *Marks' Adm'r v. Petersburg R. R. Co.*, 88 Va., 1, is relied upon. That was the case of a fatal injury to a person while attempting to cross a railroad track at a street crossing; and it was held that there could be no recovery because of the failure of the plaintiff's intestate to exercise ordinary care. But the present case is widely different from that; and as negligence is a relative term, each case must be determined on its own circumstances.

Opinion.

Here the plaintiff was ordered to do work, which, according to the evidence, the credit of which is admitted by the demurrer to evidence, required his undivided attention. It was, besides, work as to which he was inexperienced. He testifies that he was never on the wall but twice before the accident, and that on each of those occasions he was sent to do entirely different work. This was presumably known to the foreman of the shop, who yet gave him no warning or instruction when the order to empty the pans was given.

He testifies, moreover, that when he arrived at the shops the fire in the engine that runs the crane had been extinguished, and that the crane was stationary. How long after this it was that he was ordered to empty the pans does not distinctly appear; but when, in obedience to the order, he went on the wall, the crane was still stationary, and, as he supposed, for the same reason; and it had not moved from that position when, after he had removed two of the pans, he looked in that direction.

The defendant contends that the plaintiff by turning his head could have seen the approach of the crane, and that he was negligent in not keeping a proper lookout. But the engrossing nature of the duty he was performing, and all the other circumstances of the case already adverted to, together with the presumption, upon which he had a right to rely, that the defendant would act with due care in providing for his safety, negative the idea of contributory negligence on his part, and entitle him to recover.

It is not to be overlooked that the case stands on a demurrer to evidence, and, consequently, that all inferences from the evidence most favorable to the demurree are to be drawn when there is any doubt as to which of two or more inferences shall be deduced. In such a case the established test is that laid down by Judge Stanard in *Ware v. Stephenson*, 10 Leigh, 155, who said: "When the question is whether or no a fact ought to be taken as established by the evidence, either directly or

Opinion.

indirectly, in favor of the demurree, I do not know a juster test than would be furnished by the inquiry, Would the court set aside the verdict had the jury on the evidence found the fact? If the verdict so finding the fact would not be set aside, it ought to be considered as established by the evidence demurred to." And in a long line of cases this court has decided that where some evidence has been given tending to establish the fact in issue, or where the evidence consists of circumstances or presumptions, a verdict fairly rendered ought not to be set aside merely because the court, if upon the jury, would have given a different verdict, but the evidence must be plainly insufficient to justify the verdict being set aside.

Viewing the case at bar in the light of these principles, we are constrained to the conclusion that had the jury, upon the whole case, found for the plaintiff, it would have been improper to set aside the verdict, and, therefore, that judgment on the demurrer ought to have been given for the plaintiff.

As to the action of the trial judge in permitting the plaintiff's counsel in the argument upon the question of the *quantum* of damages to state to the jury that, so far as they were concerned, the demurrer to evidence was a practical admission of negligence on the part of the defendant, we see nothing to the prejudice of the defendant.

For the reasons, however, already stated, the judgment must be reversed, and final judgment entered for the plaintiff for the damages conditionally assessed by the jury, with interest and costs.

JUDGMENT REVERSED.

+ Both points wrong - Allowed by
Legislature immediately after
Richmond.

See Acts, 1893-94, p. 545. CRAIG v. WILLIAMS.

FEBRUARY 1st, 1894.

- See Acts 93-4, p. 495.
1. **APPEAL—Jurisdiction.**—Where claim of each appellant is less, though the aggregate be more, than \$500, no appeal lies, unless the questions as to all are the same, and they have been consolidated.
 2. **ATTACHMENTS—Where returnable.**—All attachments, whether by regular writ or by indorsement on the summons, must be returned to a term of the court where pending. Code, § 2965.
 3. **CHATTEL MORTGAGES—Lex loci contractus.**—A trust deed of chattels, valid and recorded in another State, is valid in this State, though not recorded here.

Appeal from decree of circuit court of Franklin county, rendered September 26, 1892, in the consolidated causes entitled Williams, White & others v. Ormond & Goforth, John Craig & others, in which there were thirteen cases consolidated and heard together. Craig, a resident of South Carolina, was the mortgagee in a mortgage regularly executed and recorded there, but not in accordance with the laws of Virginia. Williams, White & Co., attached property in said county to satisfy their claims against Ormond & Goforth, which property was the subject of the mortgage. The question was as to the priority between the attachments and the mortgage. The circuit court having decreed against Craig, he appealed. Opinion states the case.

Anderson & Hairston and Staples & Munford, for appellant.

Dillard & Lee and Kean & Lile, for appellees.

Opinion.

LACY, J., delivered the opinion of the court.

The appellees, Williams, White & Co., brought their suit in equity in the circuit court of Franklin county, and for an attachment on certain personal property situated in said county, against the appellant, John H. Craig, and Ormond & Goforth, non-residents of the State of Virginia, to have satisfaction of certain debts due by the said Ormond & Goforth to the said complainants. Ormond & Goforth are railroad contractors and constructionists doing work in the said county of Franklin, in the State of Virginia, where the said property is situated. The said John H. Craig is a non-resident of Virginia, resident in the State of South Carolina, and the mortgagee in a mortgage executed by the said Ormond & Goforth in the said State of South Carolina, on the 2d day of November, 1890, upon the property attached, now in this State, and other property then in the State of South Carolina, which was admitted to record, upon insufficient authentication by the law of this State, on the 26th day of November, 1891, by the evidence of one witness, one J. S. Brice. Upon the bringing of this suit, numerous other suits were brought for different debts of various amounts, varying in amount from \$1,300 to \$50, but otherwise identical in character; and, in proceedings had in them, they were consolidated and heard with the first-named suit, and the same decree rendered for all. None of these debts appear to be disputed or denied, but the point of contest between the several plaintiffs and the defendant Craig is as to the priority of the home attachments, issued and levied in the county of Franklin, and the lien of the mortgage executed in the State of South Carolina, and duly recorded according to the laws of that State. The circuit court held the foreign mortgage ineffectual for want of proper recordation in the State of Virginia, and sustained the lien of the attachments, and decreed accordingly for their several debts in favor

Opinion.

of the attaching creditors; whereupon John H. Craig applied for, and obtained an appeal to this court.

The first question which arises here on the appeal is by certain attaching creditors, Oglesby, Tutwiler & Co., and others, who, like them, have debts of less amount than \$500, it being conceded that the debts of Williams, White & Co. and Sims & Woell exceed the said sum of \$500, which is necessary to give this court jurisdiction of such an appeal, which is merely pecuniary; and they, the said Oglesby, Tutwiler & Co., and others in like situation, insist that the appeal should be dismissed as to them, for the stated reason that the amount involved is less than the amount required to sustain the jurisdiction of this court. This court has no jurisdiction to hear an appeal which is merely pecuniary, and is less in amount than \$500. In order that the defendant may enjoy the right of appeal when it depends on the amount, the judgment or decree must be for at least \$500, principal and interest, exclusive of cost, and that the plaintiff may enjoy it, his claim must not be less than \$500, principal and interest; and, if several creditors are seeking, by creditors' bill, to subject property to their debts, no one of which amounts to as much as \$500, although, in the aggregate, the sum is much greater, there can be no appeal on the creditors' part, because their claims are independent one of another; but the owner of the property, when the total debts is as much as \$500, although severally the claims be less, may appeal. 4 *Minor Inst.*, 857; *Umbarger v. Watts*, 25 *Gratt.*, 167; *Railroad Co. v. Colfelt*, 27 *Gratt.*, 779, 780; *Devries v. Johnston, Id.*, 808; *Gage v. Crockett, Id.*, 735. And, where the interests are distinct and separate on the part of the appellants, the decree may be reversed as to one, and dismissed as to another, as having been improperly awarded, because the subject of controversy, as to him, is less than \$500 (*Cocke v. Minor*, 25 *Grat.*, 260,); but where the amount in controversy involved in the appeal is above the jurisdictional amount as to one of the appellants, the question is properly before this court as to that one; and

Opinion.

when the questions as to all others are identical, and the claims have been consolidated and heard together, the validity or invalidity of the decree will affect them all, and involve the validity of the decree as to all, and in all respects. The interests in such case are such that they cannot be severed in any court where they are considered, and the decision here as to the rights of one will conclude the rights of all in like condition. *Witz v. Osborn*, 83 Va., 227. We must therefore overrule the motion to dismiss the appeal as to some of the appellees for want of jurisdiction.

There are two causes of error assigned by the appellant. The first is that the attachments sued out by the appellees were invalid because they are made returnable to rules, and, being attachments in equity, they are authorized to be made returnable to a term of the court, being issued in a pending suit. The second is that priority was given to the attachments because they were issued and levied before the foreign mortgage was recorded, according to the laws of this State.

Upon the first question—as to the validity of the attachments when they are, as here, returned to rules instead of to a term of the court—we will remark that the statute of this State requires (section 2965) that “if issued in a pending suit it shall be returnable to a term of the court in which the same is pending.” The former law of this State added, after the foregoing, the words, “or to some rule day thereof.” There is, therefore, no longer any lawful authority to return such an attachment to rules. It is argued that this is a mistake—an accidental omission—on the part of the lawgivers, because it would render the law nugatory in many cases like this, where attachments were issued after suit was brought, because, a summons having been issued, served, and returned, the requirement in the law that the clerk should indorse on a subpoena an order, to the officer to whom it is addressed, to attach the property, would be an ineffectual direction when the attachment was subsequent, and could refer only to writs of

Opinion.

attachment, and not to such as this. But (1) the act expressly declares that any attachment issued under that chapter (chapter 141, Code) shall be, if in a pending suit, returnable to a term of the court in which the same is pending; and (2) the supposed difficulty lying in the way of endorsing it on the subpæna in the case is answered by the provision of section 2964. The provision is: "Upon such affidavit the plaintiff may require the clerk to endorse on the summons an order to the officer to whom it is directed to attach," etc. Nor is there any difficulty in the way in the subsequent provision that "any attachment under this section shall be executed in the same manner and shall have the same effect as at law, but the proceedings therein shall be the same as in other suits in equity." The contention that this proceeding is required only as to, and refers only to, technical writs of attachments, such as are issued at law independent of the summons, and not to proceedings in equity, where it is insisted that the summons and order for attachment are inseparable, is set at rest by the law, in the plainest terms. Reliance is placed on the provision: "Any attachment under this section shall be executed in the same manner as at law and have the same effect as at law. But the proceedings therein shall be the same as in other suits in chancery;" and it is claimed that the manner of return is a part of the proceedings. If there can be said to be any proceedings in a suit until the original process is returned executed, it is obvious that the above general reference to the proceedings must refer only to such proceedings as are not specially provided for in the statute. We think the circuit court erred in upholding the return of the attachments as valid.

But the learned counsel for the appellees insist that although the attachment should be invalid, and the lien thereof ineffectual, that, nevertheless, the suit remains, and that they are entitled to relief under their bill, independent of the attachment law. We will briefly consider the question raised as to the ineffectual registry of the foreign mortgage. The appel-

Opinion.

lant insists that the law of the place of the contract, where this is also the place in which the mortgaged property is situated at the time of the mortgage, governs as to the validity, construction, and effect of the mortgage, which will be enforced in another State as a matter of comity, although not executed or recorded according to the requirements of the law of the latter State. On the other hand, the appellees insist that the laws of other governments have no force beyond their territorial limits, and, if permitted to operate in other States, it is upon the principle of comity, and only where neither the State nor its citizens would suffer any inconvenience from the operation of the foreign law. It is said in 3 Amer. & Eng. Enc. Law, p. 190: "The general rule is that a chattel mortgage which is valid under the laws of the State where it was executed, both as between the immediate parties thereto and as against third persons, will be so held by the courts of a sister State, to which the property may be removed. And if a mortgage is valid where it is made, and if it is executed and recorded according to the laws of the State or country of its execution, it will be enforced in the courts of another State or country as a matter of comity, although it is not executed according to the requirements of the law of the latter State; and this is because of the general principle that the law of the place of contract governs as to the nature, validity, construction, and effect of the contract," citing numerous authorities. In Jones on Chattel Mortgages, p. 299, § 299, the same doctrine is laid down. "By the comity of nations, as a general rule, a contract valid where it is made is valid anywhere, and the law of the place of the contract controls as to the construction of it. Without this rule there could not safely be commercial or business intercourse between citizens of different nations. But the laws of a nation or a State have not, *ex proprio vigore*, any binding force beyond the limits of its territory. Any effect they have is *ex comitate*." It is further said (section 303): A statute relating to the recording of mortgages has no

Opinion.

application to a mortgage made outside the State, unless specially made so, though the property be afterwards brought within the State; and it does not matter that such mortgage was made by a citizen of the State while temporarily absent in another State with such property. If the mortgage be duly recorded in the State where it was executed, and the mortgagor afterwards takes the property with him into another State, no registration of the mortgage is necessary, unless made so by positive statute of that State. *Beale v. Williamson*, 14 Ala., 55; *Offut v. Flagg*, 10 N. H., 46; *Peterson v. Kaigler*, (Ga.) 3 S. E., 655; *Hubbard v. Andrews*, 76 Ga., 177; *Kanaga v. Taylor*, 7 Ohio St., 134; 70 Am. Dec., 65, 66; *Jones, Chat. Mortg.*, § 200; *Hornthall v. Burwell*, (N. C.) 13 S. E., 721; *Bank v. Lee*, 13 Pet., 107. There are decisions to the contrary, to which we have been referred, and which we have considered, but the general rule is as we have stated in the foregoing authorities. We have no express statute in Virginia requiring foreign mortgages to be recorded, and the weight of authority is that in such case our recording acts do not apply to them. The circuit court of Franklin county decided otherwise on both these propositions, and we think the decision of that court was erroneous; and the decree appealed from must be reversed and annulled; and such decree rendered here as the said circuit court ought to have rendered.

DECREE REVERSED.

Richmond.

NORFOLK & WESTERN R. R. Co. v. MCGAVOCK'S ADM'RS.

FEBRUARY 1st, 1894.

1. RAILROADS—*Injury to stock—Failure to fence.*—Where railroad company failed to fence its right of way along enclosed lands as required by Code, section 1258, in an action for stock killed on its track at a place not fenced as required: *held*, the company not allowed to prove that there was a lawful fence at said place erected by the land-owners, and that therefore it was not liable for the injury done there to the stock. Code, § 1261.
2. BURDEN OF PROOF.—LACY, J., *dissenting*, contended that “the effect of Code, § 1261, is to shift the burden of proving negligence from the plaintiff and place on the company the burden of proving the negative of this proposition.”

Argued at Wytheville. Decided at Richmond.

Error to judgment of circuit court of Wythe county, rendered at its February term, 1897, in an action wherein J. R. McGavock and J. C. McGavock, administrators of Randall McGavock, deceased, were plaintiffs, and the plaintiff in error, the Norfolk and Western Railroad Company, was defendant. Opinion states the case.

Bolling & Stanley, for plaintiff in error.

Blair & Blair, for defendants in error.

FAUNTLEROY, J., delivered the opinion of the court.

Opinion.

This suit is an action of trespass on the case for killing and injuring the horses and mule of the plaintiff's intestate, by the defendant company's cars operated upon the road, and by the agents and servants of the said company, at a point where the defendant's railway passes through the enclosed lands of the plaintiff's intestate, and where the defendant was required to fence or enclose its roadbed by section 1258 of the Code, and which it had not done.

The facts, of the killing and injuring of the horses and mule, as charged in the declaration, upon the enclosed land of the plaintiffs intestate; and the failure of the defendant to fence its roadway through the said lands; and the assessed value of the said horses and mule, so killed by the defendant's cars, agents, and servants, were all proved by the evidence, and the jury returned a verdict for the plaintiffs for \$664 67. Whereupon the defendant moved the court to set the verdict aside as being contrary to the law and the evidence, and to grant it a new trial, and moved in arrest of judgment: which motions, the court overruled, and entered judgment upon the verdict for \$664 67, with interest from the date of the verdict and the costs.

The statute, section 1258, Code of 1887, requires the defendant company to erect along its line of railroad through the enclosed land of the plaintiffs' intestate, a lawful fence on both sides of its roadway, as defined in section 2038, which may be made of timber or wire, or of both, and keep the same in proper repair, and with which the owners of adjoining lands may connect their fences as they may deem proper, &c.; and section 1261 provides, that in any action or suit against a railroad company for an injury to any property, on any part of its track not enclosed according to the provisions of this chapter, it shall not be necessary for the claimant to show that the injury was caused by the negligence of the company, its employees, agents, or servants.

The first assignment of error is the refusal of the court to

Opinion.

permit the defendant company to introduce witnesses to show that the defendant railroad company was not bound to fence its roadway at the point where the said horses and mule of the plaintiffs' intestate were killed by it, because the said intestate himself had erected a fence, which was a lawful fence, at that point between his land and the roadway of the defendant company passing through his enclosed land; and that, therefore, the defendant company was not liable for injury done by it to the plaintiffs intestate's stock at that point.

The court did not err in excluding this testimony. The failure of the company to erect a lawful fence along the line of its roadway, between the enclosed land of the plaintiffs' intestate and its roadway, as expressly required by law, makes it amenable to the penal sanction of the law for its neglect or violation of the requirement of the law, and the fact that the owner of the land has, himself, endeavored to protect his stock ranging upon his enclosed land, by building a fence, does not condone or excuse the disobedience to and neglect of the mandate of the law by the railroad defendant company, and the owner of stock getting injured by the railroad cars or servants at a point on its line through his enclosed land, is entitled to recover for the injury or killing of his stock, if the defendant company has failed or refused to comply with the law requiring it to erect and keep in order, at that point, a lawful fence. (See sections 1258, 1259, 1266, 2038, and 1261, chapter 52, Code of 1887; 7 Amer. & English Ency. of Law, p. 907 and p. 927, and cases cited in note 2, and p. 934 and note 2.)

The court did not err in refusing to instruct the jury "that although they shall believe from the evidence that the horses and stock of the plaintiffs' intestate were killed and injured on the railroad of the defendant company by the cars of the defendant company in charge of the servants, agents, and employees of the defendant company as charged in the declaration, nevertheless, if they shall believe from the evidence that there was a lawful fence along the roadbed of the defendant

Opinion.

company between its land and that of the said decedent at the place where the said injury occurred, erected there by the said decedent, or by his administrator, then the court instructs the jury that, under the statute, such a fence is sufficient; and, in the absence of gross negligence, they will find for the defendant." And the court did not err in instructing the jury "that if they shall believe from the evidence that the horses and stock of the plaintiff's intestate were killed and injured on the railroad of the defendant company by the cars of the defendant company in charge of the servants, agents, and employees of the defendant company as charged in the declaration; and shall further believe from the evidence that the said horses and stock were so killed and injured by the defendant company at a point on the said railroad, at which the said railroad passes through the land of the said decedent, Randall McGavock; and shall further believe from the evidence that the defendant company failed to fence its right of way or roadbed through the enclosed land of the said decedent at the place of said injury, then the court instructs the jury that they shall find for the plaintiffs and assess their damages at such sum as to the jury shall seem right, based on the evidence as to the value of said stock at the time the same was killed and injured."

The court did not err in overruling the motions to set the verdict aside and in arrest of judgment; and the judgment of the circuit court of Wythe county is without error, and is affirmed.

LACY, J., dissenting, said:

It was proved in the case that the land adjacent to the railroad, where the horses were kept, was enclosed by a lawful fence put up by McGavock, deceased, and that the fence was pulled down in the night, and the horses escaped on the track on a dark night, and were killed or seriously damaged, and that the horses were worth as much as the amount of the ver-

Dissenting Opinion.

dict. This evidence was all that was offered by the plaintiff. The defendant offered to prove by its witnesses that there was a lawful fence along the right of way of the company at the place where the horses escaped on the track, though not put there by the company; that the bars in this fence were up late on the evening of the day when the horses were killed at night; and that the bars were pulled down by some unknown person in the night. But the court refused to admit this evidence, holding that by the act of assembly the negligence was established by reason of the fact that the fence was not built by the company, and so instructed the jury; that the failure to fence the right of way of the company established negligence; and that this could not be contradicted or disproved by the company by any evidence whatever, and refused an instruction *per contra* offered by the defendant company. Section 1261 of the Code provides as follows: "In any action or suit against a railroad company for an injury to any property on any part of its track not enclosed according to the provisions of this chapter, it shall not be necessary for the claimant to show that the injury was caused by the negligence of the company, its employees, agents, or servants." The effect of this statute is to shift the burden of proving negligence from the plaintiff, and place upon the company the burden of proving the negative of this proposition; but it is not intended to deny all defence to the defendant, and confine the case to a simple inquiry of damages, as is held in this case. The law does not require all parts of the railroad right of way to be fenced by the company—only certain parts, described in chapter 52 of the said Code (section 1259). In this particular case there was a lawful fence erected at this spot, but the company was not allowed to prove it. The statute requires the company to cause a fence to be erected along its right of way, and one was already there in this case. I think (without expressing an opinion on any other question) that the circuit court erred in its construction of this statute, in denying all right of defense

Dissenting Opinion.

to the company; and for this cause the judgment should be reversed, and the case be remanded for a new trial to be had therein.

JUDGMENT AFFIRMED.

Richmond.

RISON v. NEWBERRY.

FEBRUARY 1st, 1894.

1. SPECIFIC PERFORMANCE—*How granted*.—If equity grants specific performance of a contract, it should do so of the contract as the parties made it.
2. IDEM—*When denied—Remedy*.—Where, without good excuse, for a considerable time, vendor of land refuses to perform the contract on his own part, he cannot, after prices have declined, have a decree for specific performance, but must be left to his remedy at law.
3. RESCISSION—*When denied—Remedy*.—Where there was no mutual mistake, no illegality, no disability, no fraud by false representations or wilful suppression of such facts as to the subject matter as the party is bound to disclose, and no undue influence resulting from confidence or friendship, equity will not decree a rescission of a contract, but will leave the plaintiff to his remedy at law.

Appeal from decree of circuit court of Wythe county, rendered February 24, 1893, in a chancery cause wherein Harman Newberry was complainant and J. F. Rison, acting on behalf of certain purchasers, Ruffin and Hairston, was defendant. The decree being adverse to the defendant, he appealed. Opinion states the case.

Berkeley & Harrison, Green & Miller and Walker & Caldwell,
for appellant.

D. S. Pierce, Fulton & Fulton and R. G. H. Kean, for appellee.

LACY, J., delivered the opinion of the court.

Opinion.

This is a suit by Harman Newberry, seeking to have specific performance of a contract in writing, made by said plaintiff with the appellant, J. F. Rison, acting on behalf of certain parties purchasers, Ruffin & Hairston, on the 2d day of April, 1890, agreeing to sell to the said parties three-fourths interest in 700 acres of his 706 acres of land in his Kent's Mill farm, in Wythe county. The said contract sets out that the six acres so reserved are those on which the dwelling is located, which was to be laid off compactly with some frontage on the Norfolk & Western railroad. The price agreed was \$100 per acre, or \$52,500 for the whole three-fourths interest. Newberry agreed in the said contract to unite with the said purchasers in the formation of a land and improvement company, for the development of the said farm by laying off the said land into town lots and selling the same, and he agreed to take one-fourth—his one-fourth interest reserved—in stock of said company in like manner and kind as shall be issued to the purchasers. The terms of payment were agreed on as follows: \$10,000 cash upon the tender of a proper deed, \$10,000 in three months thereafter, \$7,500 each in six, nine, and twelve months thereafter, and \$10,000, being the remainder, in fifteen months from the date of the first payment; the deferred payments to bear six per centum interest, evidenced by negotiable notes, and secured by trust deed upon the property conveyed. Newberry agreed in the said contract to furnish a plot showing the exact quantities and boundaries of the land sold; and there was a further stipulation that the said land company, when formed, should contribute one-half the cost of a railroad survey from the mouth of Reed creek to some point on New river to or near Stuart, Va., when the other half was contributed by others, the whole not to exceed \$5,000 in cost. By this contract Newberry was to sell, and the others were to buy three-fourths interest in the said land. The other one-fourth interest was to be contributed by Newberry; and they were together to form a company, one-fourth of the stock to belong

Opinion.

to Newberry and three-fourths of the stock to all others combined, the company to own and develop the whole land, less the six acres on which the dwelling stood, to be compactly laid off; and Newberry agreed to furnish a plot showing the exact quantities and boundaries of the land sold, which, being done, the six acres not sold would remain compactly laid off or left to itself. On the other hand, the purchasers were to pay \$10,000 on receipt of a proper deed, which Newberry was to furnish to them. The contract was executed on the 2d of April, 1890, as stated. On the next day, D. S. Pierce, attorney at law, made out an abstract of title of the said land at the instance of Rison, certifying at the conclusion and as a conclusion that "there are no incumbrances or liens on the land." On the 8th day of the same month the purchasers of the three-fourths interest from Newberry paid, in anticipation of a deed, \$10,000 cash to Newberry. But, Newberry not making a deed as expected, on the 26th of June, 1890, the purchasers, by counsel, forwarded a deed to Newberry conveying the entire property to the Newberry Land Company—the name adopted for the new company about to be formed—which was received on the next day. Newberry objected to the stated consideration in the deed of \$210,000 by the land company instead of \$70,000; but it seems that he agreed to this in order to get the cash payment of \$10,000 in advance. When Newberry received the deed he refused on the next day to execute it, because he said the exact quantity of land had not been ascertained. On the 16th day of August, 1890, Newberry's counsel acknowledged the receipt of the deed, and stated that when he offered the deed to Newberry, and offered it with the metes and bounds furnished by the purchasers, and proposed to draw a deed for him to sign and for his wife to sign also, Newberry said he did not like the way his six acres were laid off, and "he says he will not sign the deed until that is laid off to suit him." Four days afterwards Rison replied that the engineers had been given the contract to go by, and no other instruc-

Opinion.

tions, and he regretted the way the six acres had been laid off was not satisfactory to Newberry, but that, if Newberry would please inform them how he wished the six acres laid off, an endeavor would be made to arrange the plat accordingly. These directions were never given, and in the deed tendered January 25, 1893, after decree in the cause, he adopts the way the six acres are laid off, and says it is satisfactorily laid off. Newberry refused to make a deed to the company, but proposed to give further time if the purchasers would pay him yet another \$10,000 in cash before receiving the deed. In 1891 (May 20th), Newberry caused a deed to be made and tendered by his counsel, conveying three-fourths of the land to the purchasers, which the purchasers refused to accept as a proper deed, and in August, 1891, Newberry filed his bill for specific performance of the contract of April, 1890. The suit coming on to be heard upon the bill and exhibits, demurrers, pleas, joint and several answers, and exhibits as cross bills and answers to same, etc., the depositions of witnesses, etc., and and upon release deeds by the parties in interest other than Newberry, John D. Stewart, R. C. Kent, and Mrs. C. W. Kent, filed in the papers, the circuit court overruled the demurrers, and held, and so decided, that Newberry was entitled to specific performance of his contract of April 2, 1890, upon his filing in court a deed with general warranty of title, executed by himself, conveying to the vendees named in the said contract of sale three-fourths interest in the land in said contract mentioned, with the reservation of six acres, therein mentioned, within sixty days from the date of the decree; it being the opinion of the court that the complainants' title to the said land is good, and that any possible defect that could arise because of the infancy of Flora Stuart, who had signed the deed of release, could be indemnified by a reservation of the purchase money in the hands of the court for that purpose; decreed for the unpaid purchase money, credited the same by use and occupation by Newberry, and decreed a sale of the three-fourths interest if the money was not paid in sixty

Opinion.

days from that time; decreed that each party pay his own cost, and appointed commissioners to make the sale, and authorized \$3,000 to be paid into court by the defendants, to be held as indemnity against the claim of Miss Flora Stuart; whereupon the defendants applied for and obtained an appeal to this court.

Enough has been stated chronologically to show the proceedings between the parties pending their negotiations between the execution of the contract and the bringing of this suit. The evidence in the cause shows that the vendor, who now seeks specific performance, did not have the power—was not capable—of making a good deed to the land he sold at the time of the sale, and the decree in the cause procured and insisted on by the vendor himself shows that at that date—nearly three years after the contract was made—he was still unable to make a deed, and the circuit court was unable to cause a good deed to be made, but decreed that the parties defendants should receive a hypothetical deed, good if this young lady so willed hereafter, the court thought. The defendants pointed out the defects in Newberry's title. After long delay on his part, he at last made a deed. It appears plainly enough that for some unexplained reason he desired to get the cash payment in advance of a deed, and, receiving this, he refused to make a deed to the company which he had agreed to form with his vendees, and take the interest of one-fourth. Agreeing subsequently to do this, he then bethought him of the six acres, and found fault with the way it was laid off. Subsequently, when asked to state his objection to this, he waived it, and he put the six acres in the deed in the same manner, which had so long proved an insurmountable difficulty with him when so done by others. But none of these difficulties could be surmounted by him, or were surmountable by others, until the fall in prices known as the "collapse of the boom" had come. Heretofore reluctant—not only reluctant, but stubbornly and steadfastly refusing either to accept a deed tendered to him or to tender one himself—he agreed to survey

Opinion.

and plat the land, received \$10,000 before he had any valid claim to it under his contract, and yet, although he had a survey made by his own chosen surveyor, he rejected that, and did not cause any other to be made, and, when the other parties caused a survey and plat to be made by skilled engineers, he objected to that, because six acres were not laid off to suit him in general terms; and, when requested to make known his wishes precisely, that they might be complied with, lets it pass, delays for another year, and then adopts what he had so strenuously and so long objected to. We have shown that he was not capable, and it appears also that he was not ready, willing, eager, or desirous during all that period. His negotiations tended to the effort which finally culminated in the demand of \$10,000 more in cash before a deed was made by him. And yet he seeks specific performance at the hands of the court of a contract which he had so long not only neglected, but expressly refused, to comply with on his part, until the circumstances had so changed that the object of the contract could not be carried out. It was not possible to sell lots and stock in a company until a deed could be obtained by the company free from exception. And he himself had agreed to perform on his part something else besides selling and conveying the three-fourths of the land. He plainly agreed to contribute one-fourth of the capital stock to the company and put in his one-fourth interest in the company towards this end. So that by the contract the company was to own the whole land, and he to own one-fourth of the capital stock of the company. But he refused to do this, and asks that the contract which he made be enforced, specifically performed in part—performed only so far as it is favorable to him and his present views—that is, that the other side be made to fully perform on their part and he be fully released on his part; and the circuit court has so decreed. We do not deem it necessary to go into any detail as to the various questions as to the defective title held by Newberry. His delay is enough to disentitle him to specific per-

Opinion.

formance. And the decree of the circuit court, presented and insisted on by the other side, sufficiently shows his inability to comply with his contract to make a good deed to the land free from just exception. The principles which govern a court of equity in passing upon such suits are so well settled, have been so universally adhered to by this court since its foundation, and are so familiar to the profession, that no extended citation of authority is deemed at all necessary. We have over and over again gone over this question, until there is nothing which can be added. Mr. Sugden says (p. 279): "In the language of some of the judges, a party who seeks specific performance must show himself ready, desirous, prompt, and eager." Chancellor Kent said in *St. John v. Benedict*, 6 Johns. Ch. 111: "Specific performance cannot be considered a matter of right in either party, but is a matter of discretion in the court; not, indeed, of arbitrary and capricious discretion, depending upon the mere pleasure of the judges, but of that sound and reasonable discretion which governs itself as far as it may by general rules and principles, but which at the same time withholds or grants relief according to the circumstances of each particular case, when these rules and principles will not furnish any exact measure of justice between the parties." All application to courts to decree a specific performance must depend upon the circumstances, governed by the established principles of the court. If specific performance would work injustice, or be unreasonable, a party will be left to his action for damages. It is generally essential that a party seeking a specific performance should not have been backward; that he should not have held off until circumstances may have changed; or kept himself aloof so as to enforce or abandon the contract as events might prove most advantageous. The case of *Chilhowie Iron Co. v. Gardiner*, 79 Va., 305, is very much in point; *S. V. Railroad Co. v. Lewis*, 76 Va., 833; *Haskin v. Agricultural Insurance Co.*, 78 Va., 700; *Ferry v. Clark*, 77 Va., 397; 2 Lomax Dig., p. 108; *Panill v. McKinley*, 9 Gratt., 1; *Robertson v.*

Opinion.

Hogsheads, 3 Leigh, 667; 1 Story, Eq., § 693; *Graybill v. Brugh*, 89 Va., 895; *Ford v. Euker*, 86 Va., 79; *Dinsmore v. Lyle*, 87 Va., 391; *Reynolds v. Necessary*, 88 Va., 125; *Grizzle v. Sutherland*, 88 Va., 584; *Nalle v. V. M. Railroad Co.*, 88 Va., 948; Story, Eq. Jur., § 716; 3 Pars. Cont. 301; 2 Tuck. Comm., 426.

It may be observed, upon what has gone before, that the decree appealed from did not decree performance of the contract as made by the parties, but quite a different one. The appellants did not agree to buy a two-thirds interest in the land of Newberry and pay \$100 per acre for it simply. There was an agreement between the parties in the contract sought to be specifically performed that they would form a company with Newberry one-fourth owner and contributor. They were to pay three-fourths of the agreed value and Newberry one-fourth, all to go into a company for a specific purpose. The decree complained of not only compels the appellants to take a delayed and a defective title, but compels them to take three-fourths of what they substantially bargained for. It is not proved nor alleged that the appellants ever agreed, directly or indirectly, that the contract thus set up should be their contract; nor is it reasonable to suppose that they would have agreed to pay anything for an undivided interest, great or small, in this land, in order to build a town. It would have remained uncertain under such a contract where their land would lie, whether on the railroad or off of it, whether close to or at the railroad depot or remote from it; and under the court's decree it is matter of uncertainty where the appellants' part of the land will be situated. If the court decrees specific performance at all of a contract, it should do so of the contract which the parties made and the entire contract as made. The court should have decreed, if at all, upon the entire contract, and not upon a part only, and thus left not only the question of the title uncertain and dependent upon future undetermined events, but the location and situs of the land undetermined and unascertained. It cannot be said that the parties them-

Opinion.

selves purchased three-fourths only, because their contract covered effectually the entire tract—three-fourths to be paid for in money, one-fourth to be paid for in stock, but the whole to be held (except six acres, to be laid off and designated) under one right; that is, by the company, which both sides agreed to form to this end.

Specific performance is an equitable remedy, which compels the performance of a contract in the precise terms agreed upon, or such a substantial performance as will do justice between the parties under the circumstances of the case. 22 Amer. & Eng. Enc. Law, p. 909. Bouvier defines it as the “actual accomplishment of a contract by a party bound to fulfill it.” Burrill defines it: “The performance of a contract in the precise terms agreed upon; strict performance.” Mr. Justice Washington, speaking for the Supreme Court of the United States in *Hunt v. Rousmanier*, 1 Pet., 14, says: “Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise highly beneficial to society. The latter is without its authority, and the exercise of it would not only be a usurpation of power, but would be highly mischievous in its consequences.” Equity cannot make or alter a contract for the parties and then execute it. If the contract must be reformed before it can be executed, it can only be reformed in a suit for that purpose, or upon a bill particularly praying for that relief. *Grey v. Tubbs*, 43 Cal., 359; *Osborn v. Phelps*, 19 Conn., 63. Nor will equity reform a writing to make an agreement of a character different from that which the parties intentionally entered into. *Stoddard v. Hart*, 23 N. Y., 556. Under the circumstances of this case, we think Newberry is not entitled to the aid of a court of equity to have his contract specifically executed, but that this court should withhold its relief, and leave him to his action at law. And under the cir-

Opinion.

cumstances of this case, and the changed circumstances, this court ought not to rescind the contract at the instance of the appellants. There are no sufficient grounds alleged nor proven upon which to base a rescission. Fraud is the most frequent ground for rescission, but it cannot be said that Newberry has practiced this upon the appellants. False representations, to be fraudulent, must be a false statement of facts, positively made, not mere matters of erroneous opinions. A concealment to afford ground of rescission for fraud must be a willful suppression of such facts in regard to the subject-matter of the contract as the party making it is bound to disclose. We cannot say that there is any inadequacy of consideration, sufficient to suggest fraud; no undue influence resulting from confidence or friendship. There is no mutual mistake, no illegality, disability, coverture, or infancy. Non-performance to justify rescission must be a total failure of performance. Under all the circumstances of this case, we will refuse specific performance, and deny the prayer for rescission, and reverse the cause, and dismiss the bill, without prejudice to the right of either party to bring his action at law for such damages as he may be advised he has sustained in the premises; that is, the parties will be left to seek their remedy in a court of law. The decree of the circuit court decreeing specific performance is for the reasons stated, erroneous, and must be reversed and annulled.

DECREE REVERSED.

Richmond.

MILLS & FAIRFAX v. NORFOLK & WESTERN R. R. Co.

MARCH 8th, 1894.

1. **CONTRACT—Construction—Fraud.**—A stipulation in a contract to construct a portion of a railway, making the estimates and certificates of the company's engineer as to the amounts due thereunder binding and conclusive on the parties in the absence of fraud, *held*, not to make such estimates and certificates conclusive on the contractor, where made in such plain violation of the terms and prices specified in the contract as to amount to a fraud, or a mistake so gross as necessarily to imply fraud, or bad faith, especially where the contract also provides for a final estimate of the quality, character, and value of the work according to the contract.
2. **IDEM.—Releases—Failure—Excuses.**—The failure or neglect of a contractor for the construction of a portion of a railway, to give, or tender, to the railway company, releases from claims or demands of mechanics and material men, or others, as required by the contract, *held*, excused where the estimates of the company's engineer, upon which the payments are to be based, are incorrect and fraudulent, because not within the terms of the contract, especially where all the persons having any claims have been fully paid and the time has expired within which they could assert any demands against the company, or file any liens on its property.
3. **ACTION ON CONTRACT—Declaration.**—Where declaration in an action on such a contract, having set forth the same, alleges performance and acceptance of the work required thereby, and the refusal of the company to pay therefor, except on the estimates and certificates of its engineer made so plainly in violation of the terms and prices specified in the contract, as to amount to fraud, *held*, the declaration is sufficient in law.

Error to judgment of circuit court of city of Roanoke, rendered September 3d, 1892, in an action of covenant, wherein

Statement—Opinion.

George T. Mills and Henry Fairfax, late partners, doing business as Mills & Fairfax, were plaintiffs, and the Norfolk & Western Railroad Company was defendant. The company demurred to the declaration, the demurrer being not to its form, but to its substance and going to the merits of the case. The circuit court sustained the demurrer, and the plaintiffs brought the case here on a writ of error. Opinion states the case.

Eppa Hunton, Jr., and Penn & Cocke, for plaintiff in error.

Watts, Robertson & Robertson, for defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

This suit grows out of a contract, under seal, between the said Mills & Fairfax, plaintiffs, and the Norfolk & Western Railroad Company, defendants, dated the 1st day of February, 1887, whereby the plaintiffs agreed with the defendant to build a certain specified portion of the Elkhorn branch of the Flat Top extension of the said defendant's line of railroad, including the tunnel through the Flat Top mountain on the "No. 3" coal bed.

The said contract is very voluminous, but the whole controversy depends upon the *price* to be paid for the excavation of certain sections of the tunnel, according to the specifications in said contract especially relative thereto; the plaintiffs maintaining, that they are entitled, by the express terms and intendment of the said contract, to \$3 50 per cubic yard, instead of \$1 75, the amount or price allowed to them. And this suit is to recover the difference between these prices, for the work done, and admittedly well, and acceptably, done, by the plaintiffs for the defendant, under the contract, amounting to the sum of \$23,100, and the reserved per centum retained, viz: \$9,709 20.

There was a coal vein running through the Flat Top mountain,

Opinion.

visible at each end of the proposed tunnel; and it is, in tunnelling, much easier and less expensive to excavate coal, than the solid rock through which tunnels are usually cut. And not only is the coal itself, comparatively, easy and inexpensive to excavate, but the vein of coal is surrounded by shale, which is pliable, easy, and inexpensive to excavate. Under these circumstances, it was an important matter with the contracting parties to determine whether this coal vein continued through the entire length of the proposed tunnel; or whether it would become of insignificant size. It was impossible to determine this point, except by the excavation itself; therefore, in justice to both parties to the contract, it was explicitly agreed and stipulated to pay for the tunnel, *one price*, if the coal vein continued through the tunnel four feet thick; and a *larger price*, if it became of a less thickness than four feet. The contract has the following provisions bearing on this subject: "For Flat Top tunnel excavation, coal at 59 cents per ton of 2,240 pounds; for Flat Top tunnel excavation, rock and other material, at \$1 75 per per cubic yard. The nineteen (19) feet of height of the section (of the tunnel) will be made up in its lower half, partly of No. 3 coal bed; and, in its upper half, of overlying slates, fire-clay, and sandstone." * * * "If the coal bed should become of a less thickness than four feet, exclusive of the slates and coal not usually mined in the run of mine coal in adjoining collieries, this will entitle the contractors to a price of three and one-half (\$3 50) dollars per cubic yard for the entire section of the tunnel, instead of the prices for coal and other excavations mentioned herein."

"Payment is to be made by the party of the second part for work done and materials furnished under this contract, on or about the 15th of each month, upon proper estimates rendered on the last day of the preceding month for the work done and the materials furnished during the preceding month, to the extent of and not beyond 85 per cent of the amount of such estimates; and such monthly estimates, to be valid, must be accompanied by

Opinion.

the certificate of the engineer of the company, approving the same and declaring that the work done and materials furnished as therein stated, are according to this contract; and without such certificate no estimate shall be valid and no payment can be demanded; and in all questions connected with such estimates and the amounts payable thereby and thereunder, the decision of the said engineer shall be final and conclusive on all parties; and the balance thereof, or the fifteen per cent remaining on such estimates shall not be payable until the whole work to be done under this contract has been fully completed, but shall be kept back as part of the security for the performance of this contract on the part of the parties of the first part."

"IV. When the engineer in charge has furnished his certificate that all the work embraced in this contract has been completed agreeably to the specifications and in accordance with the directions and to the satisfaction and acceptance of the said engineer, there shall be a final estimate made of the quality, character, and value of said work, according to the terms of this agreement; when the balance appearing due to the said parties of the first part according to the certificate of said engineer, shall be paid to them within thirty days thereafter, upon their giving a release under seal to the party of the second part from all claims and demands whatsoever, growing in any manner out of this agreement, and upon their procuring and delivering to the party of the second part full release in proper form and duly executed, for mechanics and material men, of all liens, claims, and demands for materials furnished and provided, and work and labor done and performed upon or about the work herein contracted for under this contract."

It is alleged in the declaration that the "No. 3" coal bed did not only become of a less thickness than four feet, exclusive of the slates, &c., but that it entirely disappeared from the tunnel for the distance of 1,200 lineal feet, equal to 13,200 cubic yards; and that this fact is evidenced by the profile of the tun-

Opinion.

nel prepared by the defendant and furnished by it to the plaintiffs and filed with their declaration. This fact, expressly and distinctly alleged in the declaration, is admitted by the demurrer, and is not denied in fact. The plaintiffs do not claim the price of \$3 50 per cubic yard where the vein of coal became of less thickness than four feet (as by the express terms of the contract they might do), but only where the vein of coal entirely disappeared from the tunnel, as shown by the defendant's profile, and admitted by the demurrer. Notwithstanding the clear and explicit provision of the contract, and the acknowledged disappearance of the coal vein from the course of the tunnel, and notwithstanding that the defendant's engineer in charge furnished his certificate, on the 8th day of July, 1888, that all the work embraced in the contract had been completed, by the plaintiffs, agreeably to the specifications and in accordance with his directions and to his satisfaction and *acceptance*; yet the Norfolk and Western Railroad Company refuses to pay for the work done by the plaintiffs according to the *price* fixed by the contract, and accepted by them, because its own engineer (who is a part of itself—its other *ego*—its paid employee), certifies that the plaintiffs are entitled to only \$1 75 per cubic yard, instead of \$3 50 per cubic yard; and that this action of its employee, however unjust and however flagrantly in abrogation of the *price* carefully guarded and fixed in the contract itself, is final and conclusive on the plaintiffs.

And this contention of the Norfolk & Western Railroad Company, the defendant, is approved and sustained by the order of the circuit court of Roanoke city complained of, and now under review—which dismisses the plaintiffs' suit on demurrer, without any investigation of the merits of their claim.

The grounds of the demurrer to the plaintiffs declaration, and to each count thereof, as stated in the brief of the appellee's counsel, are: 1. "Because the contract between the parties makes the estimates and certificates of the engineer as to the amounts due under the contract conclusive and binding

Opinion.

upon both parties, in the absence of fraud on the part of the engineer who made said certificates and estimates." And "in the first place, it is contended, that the declaration does not charge fraud upon the engineer at all, in the sense in which the word is used in all the decisions on the subject. All that it does is to charge, as a conclusion of law, that the engineer made a mistake so gross as to amount to fraud, &c."

This ground of demurrer is neither true nor tenable. The contract makes the parties fix the price at \$3 50 per cubic yard: "If the coal bed should become of a less thickness than four feet, exclusive of slates and coal not usually mined in run of mine coal in adjoining collieries, this will entitle the contractor to a price of \$3 50 per cubic yard for the entire section of the tunnel, instead of the prices for coal and other excavations mentioned herein." And the contract, so far from leaving the *price* to the estimate or discretion of the engineer, guarded by and imperatively, provides "there shall be a final estimate made of the quality, character, and value (not *price* per measure) of said work, *according to the terms of this agreement*: thus making the terms of the contract imperative upon the engineer, as the fixed basis of his calculation of the amount or value of the work *according to the price fixed by the contract*. There is no dispute or question as to the quality or character of the work, or as to its completion to the approval, satisfaction, and acceptance of the engineer: but the predication is, that, though the price is fixed by the contract, it emasculates itself—commits *felo de se*—and makes the engineer the absolute, final and arbitrary *dictator* of the *price*, or rate of compensation, which the contractors shall receive; and which, only, his principal shall pay. Even if this absurdity can be predicated of the *monthly* estimates provided for by the 3d section of the contract, there is nothing, whatever, said in the 4th independent section, as to the finality and binding force of the engineer's decision or estimate; nor, indeed, is there any provision that the engineer, as such, shall make any estimate. The provision

Opinion.

is: "IV. When the engineer in charge has furnished his certificate that all the work embraced in this contract has been completed agreeably to the specifications and in accordance with the directions and to the satisfaction and acceptance of the said engineer, there shall be a final estimate made (not necessarily by the engineer) of the quality, character, and value of the said work, *according to the terms of this agreement*, by whomsoever made."

It is expressly, distinctly, and positively charged in the declaration, that both the monthly and final estimates, made by the engineer of the company, were not made according to the terms of the contract; but were made in open and direct violation of the terms and intendment of the agreement under seal between the parties. That, by the estimate of the engineer, the price of \$3 50 per cubic yard, fixed by the agreement, for the section of the tunnel in which the coal bed No. 3 became of less thickness than four feet, (and, in fact, wholly disappeared from the said tunnel,) was altered by the engineer and put at \$1 75 per cubic yard; and that, in so doing, the said engineer made a mistake so gross as to amount to a fraud upon the plaintiffs, depriving them of the enormous sum of \$23,100, to which they are justly entitled under the contract. The second count is like the first, except that, instead of charging that the estimates and certificate of the engineer were a mistake so gross as to amount to a fraud, it alleges that "the engineer, at the time said certificate and estimates were made, knew that the said 'No. 3' coal bed not only became of a less thickness than four feet, as aforesaid, but entirely disappeared, which said conduct on the part of the said engineer is a fraud upon the rights of the said plaintiffs."

The third count is like the others except that, instead of charging mistake, as in the first count, and fraud, as in the second count, it charges that in making said certificate and estimates the said engineer did consult, confer, and advise with certain officers and employees of the said defendant company,

Opinion.

&c., which said action of the said engineer they charge was misconduct, illegal, and injurious to their rights. The rule of law is that, even when the engineer acts strictly within the scope of his authority (the contract and terms of the agreement), that fraud, or mistake so gross as to amount to fraud, or necessarily to imply bad faith, will vitiate the estimate and set aside his decision; and, even in the case of an award, the arbitrator is held strictly to the terms of the submission, the contract of the parties, and cannot go outside of it, or contravene it. In the case of *Condon v. Southside Railroad Co.*, 14 Gratt., Judge Moncure says: "It now only remains, under the head we are now considering, to inquire whether the estimate made by the engineer in this case was such a one as the contract authorized? Did the engineer exceed his authority in making the estimate? If he did, then by analogy to the case of an award, and according to a principle of law which governs this case alike with that (if, in fact, there be any difference in this respect between the two cases) the estimate is void. The parties intended that all questions, whether of law or of fact, which might arise under the contract, should be determined by the engineer. * * * It is expressly declared that he shall determine when the contract has been complied with according to its just and fair interpretation, and the amount of the same, and all disputes and difficulties arising under the same, and that his decision shall be obligatory and conclusive between the parties without further recourse of appeal. He cannot set aside or disregard the contract between the parties. That contract must furnish the law of the case. He cannot alter the prices thereby ascertained, even though he may consider them too high or too low. If it should appear that he did so, his act would undoubtedly be void." See, also, *Galveston, &c. R. R. Co. v. Henry & Dilley*, 27 Amer. & Eng. R. R. Cases, 265; *Kisner v. Indianapolis, &c. R. R. Co.*, 12 Amer. & Eng. R. R. Cases, 314; *Louisville, &c. v. Donnegan*, 34 Amer. & Eng. R. R. Cases, 122.

Opinion.

The first count in the declaration charges a mistake in the certificate and estimate of the engineer so gross as to amount to a fraud upon their rights under the express and fixed terms of the contract, and such as necessarily implies bad faith.

The second count charges that the estimate and certificate of the engineer are founded on falsehood and a fraudulent perversion of fact, and are therefore not conclusive or final; that the engineer knew that the coal bed No. 3 had, in fact, wholly disappeared from the tunnel excavation, when he inferentially certified that it had continued to be four feet thick in the tunnel, by estimating and certifying that the plaintiffs were entitled to only the price of \$1 75 per cubic yard instead of the price of \$3 50 per cubic yard fixed by the contract to be their due if the coal bed, No. 3, should become of less thickness than four feet in the course of the tunnel. And this action of the engineer is charged to be actual fraud, and a deprivation to them of \$23,100 of their just dues under the contract fully performed by them.

The third count charges such misconduct on the part of the engineer as would vitiate and set aside an award in ordinary arbitration case, and, *a fortiori*, in this case.

These counts are all good and sufficient; and the court erred in sustaining the demurrer and denying to the plaintiffs the opportunity to make good their allegations by proof.

But, even though no fraud, mistake, or misconduct is alleged in the declaration, still it is alleged that the estimates and certificate of the engineer are not within the terms of the submission, but are in violation of the contract; and are, for that reason, void and inconclusive. The declaration alleges, that the contract fixed the compensation of the plaintiffs, under the circumstances admitted, at \$3 50 per cubic yard, and that the estimate of the engineer fixed the compensation at \$1 75 per cubic yard. If this be true, the engineer has exceeded his authority and abrogated the contract between the parties.

The second ground of demurrer is, that "the plaintiffs show

Opinion.

no cause of action, because the declaration does not allege that the releases mentioned in the 4th clause of the contract were ever given or tendered to the defendant, and no adequate excuse is set up for not tendering said releases." Two releases are provided for by the 4th clause of the contract. One from the contractors; the other from "mechanics and material men."

The principle is, that, if the estimates are proper and show the correct amount due, the release must be tendered to entitle the contractors to recover: but if, on the contrary, the estimates are not correct because fraudulent, or because not within the terms of the contract, the tender of a release is not necessary. The reason for the failure to tender the release is alleged in the declaration to be the refusal of the defendant to pay the amount due; and because fraud is charged in the declaration. And the declaration further says that all the mechanics and material men employed by said work, or having any claim or demand in reference thereto, have long since been fully paid, and that the time has long since expired, within which such mechanics and material men could assert any liens, claims, or demands upon or against said work, or upon or against said defendant; and, in fact, no such liens were ever filed or asserted. The plaintiffs must be allowed the opportunity to prove their case made by their declaration; and the circuit court of Roanoke city erred in sustaining the demurrer to the declaration, and to the several counts thereof.

For the foregoing reasons we are of opinion that the judgment of the circuit court of Roanoke city complained of is erroneous, and the same must be reversed and annulled; and the case will be remanded to the said court for further proceedings upon the merits.

JUDGMENT REVERSED.

Richmond.

VIRGINIA LAND CO. v. HAUPT.

MARCH 8th, 1894.

1. **CORPORATIONS—Subscription—Fraud.**—Where one is fraudulently induced by an agent or promoter of a corporation to subscribe to its capital stock, *held*, he may repudiate the contract at his discretion.
2. **IDEM—Case at bar.**—Where such promoter induced defendant, in ignorance of the fact that the former had an option on the land which the corporation was formed to purchase, and in reliance on the former's supposed disinterested and superior judgment, to subscribe to the capital stock, and the defendant was thereby misled to his injury into making a contract which otherwise he would not have made, *held*, the defendant is not bound by his subscription.
3. **IDEM—Waiver.**—Nor does such defendant waive his right to annul his said subscription by giving to said promoter a proxy to represent him in the first stockholders' meeting, when the facts as to the promoter's option on said land was disclosed, as defendant should not be affected by notice to the promoter of what the latter knew from the beginning and did not disclose to him.
4. **IDEM—Laches.**—*Laches* does not begin to run until subscriber is chargeable with notice that a fraud has been perpetrated upon him.
5. **IDEM—Notice—What is—Duty to investigate.**—Mere suspicions or random statements heard in public, or in stockholders' meetings, do not necessarily constitute notice. But after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once.
6. **IDEM—Burden of proof.**—Corporation has the burden of proof in asserting that the subscriber had notice and was guilty of *laches*.

Error to judgment of circuit court of city of Roanoke, rendered at its January term, 1893, in an action at law wherein the Virginia Land Company was plaintiff and S. B. Haupt

was defendant. The judgment being adverse to the plaintiff company, it appealed. Opinion states the case.

Watts, Robertson & Robertson, for plaintiff in error.

Griffin & Glasgow, for defendant in error.

LEWIS, P., delivered the opinion of the court.

The defendant in error was sued by the Virginia Land Company to recover certain unpaid assessments on the capital stock of the company, aggregating \$2,800. The principal grounds of defence were (1) Fraud in the procuring the contract of subscription; and (2) a material variance between the prospectus and the charter of the company. The jury found for the defendant, and the court refused to disturb the verdict.

The defendant subscribed to the stock at the instance of one O'Leary, who was a real estate agent at Roanoke and one of the promoters of the company. It was proposed in the prospectus "to organize a company for the purchase of a certain tract of land, lying near the said city, containing about 550 acres, and to lay it out in residence lots, and to develop its natural attractions." By the charter, subsequently obtained, the company was authorized to buy land not exceeding 5,000 acres; also personal property, and to issue mortgage bonds; to loan money; to develop lands; to construct street railways, and to use cars impelled by any kind of motive power; to erect and operate water, gas, and electric works, etc., etc.

O'Leary was known to the defendant as a successful business man, and his name headed the subscription list. When he solicited the defendant to subscribe, he informed him, in answer to a specific inquiry, that the land proposed to be purchased belonged to Yates, Moormaw, and Moorman. In point of fact O'Leary and one Christian, another subscriber to the stock and a promoter of the company, held options on the

Opinion.

land, which fact was not disclosed to the defendant. O'Leary recommended the stock to the defendant as a desirable investment, and upon his advice the defendant agreed to take one hundred shares.

After the organization of the company the land was transferred to the company, and in consequence, O'Leary and Christian realized a large profit.

The company was chartered early in March, 1890, and on the 19th of the same month the first stockholders' meeting was held, at which meeting O'Leary represented the defendant as his proxy. At the same meeting an assessment of ten per cent of the capital stock was ordered, notice of which was afterwards sent to the defendant; and on the 23d of the ensuing August another assessment of five per cent was ordered. Upon receipt of notice of this last assessment the defendant wrote the secretary of the company, as follows:

"Dear Sir,—I have your notice of September 1st, calling for an assessment of \$500—five per cent on 100 shares of your stock. If you will please refer to my letter of April 28th, addressed to your treasurer, you will notice that I am not a stockholder in your company. Although I have never received a reply to this letter, I take it that in the absence of such acknowledgment, my stock was, as a matter of course, cancelled. So that there may be no further misunderstanding in the matter, however, I beg to advise that I am not a stockholder in the Virginia Land Company, having paid no assessments whatever on the subscription."

In the notice of the ten per cent assessment of March 19, 1890, it was said: "This amount must be paid promptly or the stock will be declared forfeited," and in response to this, the defendant's letter of the 28th of April, above referred to, was written, which is as follows:

"Dear Sir,—I have your favor of the 24th instant, calling attention to ten per cent assessment on the Virginia Land Company's stock, and in reply beg to say that recent financial

Opinion.

arrangements in another direction that I am suddenly called upon to provide for, will make it impossible for me to pay this assessment now, and to prevent delays, as well as to avoid being a hindrance in any way to the success of the company, I will be glad if you will consider my stock forfeited, as provided for in notice of assessment. * * * I will be glad, therefore, if you will dispose of my stock to other parties. I have been informed that the stock is selling at a premium, so that I presume there will be no difficulty in doing this. Having paid nothing on the stock, I am, of course, not entitled to anything from it."

At the trial the defendant testified that when he subscribed to the stock he had no other information respecting the proposed enterprise than such as he obtained from the prospectus and what was told him by O'Leary; that he was induced to subscribe by the urgent solicitation of O'Leary, in whose judgment and integrity he had confidence, and who recommended the stock as a good investment. He also testified that he had no idea that O'Leary was interested in the land which it was proposed to buy otherwise than as a stockholder, and that so far from the fact being disclosed to him, O'Leary, when questioned on the subject, represented that it belonged to Yates, Moormaw and Moorman. He testified, further, that he would not have consented to subscribe had he known of the promoters' interest in the land, and that he had no intimation of any such thing as "a promoters' fund" until several weeks after he had subscribed.

The court, among other things, instructed the jury that if they believed from the evidence that O'Leary and Christian held options on the land, and that O'Leary induced the defendant to subscribe in ignorance of that fact, relying on his (O'Leary's) supposed disinterested and superior judgment, and that he, the defendant, was thereby misled, to his injury, into making a contract that he otherwise would not have made, then the subscription was voidable at his option.

Opinion.

This instruction propounds the law correctly. The authorities are abundant in support of the general rule that a person fraudulently induced by an agent of a corporation—and a promoter is an agent—to subscribe to its capital stock, may, at his option, repudiate the contract; and a fraud may consist as well in the suppression of what is true as in the representation of what is false. Indeed, the law is that where the person solicited to subscribe has no other information on the subject than that which the agent chooses to convey, the statements of the agent ought to be characterized by the utmost candor and honesty. 1 Cook, Stock, Stockh. and Corp. Law (3d ed.), sec. 147; *Crump v. U. S. Mining Co.*, 7 Gratt., 352; *Bosher v. R. & H. Land Co.*, 89 Va., 455; *Directors, &c. v. Kisch*, L. R. 2 H. L. App. Cas., 99.

It is contended, however, that the defendant has by his conduct waived the right to annul the contract in question. But there can be no waiver in a case of this sort without knowledge of the facts, and such knowledge on the part of the defendant has not been shown. He says he had an intimation, a few weeks after the organization of the company, that there was a large promoters' fund, but as to who were the parties interested in the fund he was not informed. He made inquiry on the subject, but could ascertain nothing definite, and relied, he says, on his letter of the 28th of April, in reply to the notice of the first assessment, to which he received no reply. And afterwards when notified of the five per cent assessment he promptly replied, calling attention to his said letter, and saying he was not a stockholder. He also called the attention of one of the directors of the company to the intimation he had had in regard to the promoters' fund, and informed him that he repudiated the contract.

It is true he gave a proxy to O'Leary to represent him at the first stockholders' meeting, at which meeting the facts in regard to the promoters' options on the land were disclosed. But, as was well said in the argument at the bar, it would be

Opinion.

absurd to hold that he was affected by notice to O'Leary of what the latter knew from the beginning, and failed to disclose to him. And if he was not affected by notice to O'Leary, then there is no proof that he received any certain information of the facts constituting the fraud complained of before the institution of the present action.

In treating of *laches* as a bar to the subscriber's remedies, Cook says: "The date from which *laches* begins to run is the time when the subscriber is first chargeable with notice that a fraud has been perpetrated upon him. Mere suspicions or random statements heard in public or in stockholders' meetings do not necessarily constitute notice. But after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once. The corporation has the burden of proof in asserting that the subscriber had notice and was guilty of *laches*." 1 Cook, Stock, Stockh. and Corp. Law (3d ed.) sec. 162.

Applying these principles to the present case, we are of opinion that, upon the ground of fraud, the case is with the defendant, and that there has been no waiver of the fraud on his part; and as this view is decisive of the case, it is needless to consider whether the case is within the ruling in *Norwich Lock Man'g Co. v. Hockaday*, 89 Va., 557, on the ground of a variance between the prospectus and the charter of the company.

There were a number of exceptions taken to rulings of the court during the progress of the trial, to review which, *seriatim*, would extend this opinion to a great length. It is enough to say, in this connection, that the case was submitted to the jury in substantial conformity with the views expressed in this opinion, and that the judgment must be affirmed.

JUDGMENT AFFIRMED.

Richmond.

TYLER, RECEIVER, v. SITES.

MARCH 8th, 1894.

1. RAILROADS—*Trespassers—Injuries—Deaf mute.*—Persons in charge of a train have the right to assume that one walking on the track will get off before train reaches him; and the company is not liable for the death of a deaf mute who was walking on the track with his head bent down without looking for a train, and was struck by a train and killed.
2. *IDEM—Opinion—Evidence.*—Question to witness in action for killing one walking on railroad track as to whether there was enough in deceased's appearance to indicate to the engineer that he was in possession of his faculties, *held*, inadmissible as asking for witness' opinion on a fact which it is the province of the jury to determine from the facts testified to.

Error to judgment of circuit court of Rockingham county, rendered April 6, 1893, in an action of trespass on the case wherein V. H. Lam, sheriff of Rockingham county, and as such administrator of Thomas H. Sites, deceased, was plaintiff, and S. F. Tyler, receiver of the Shenandoah Valley Railroad Company, was defendant. There having been a verdict and judgment for the plaintiff for \$1,500, the defendant obtained a writ of error. Opinion states the case. .

George E. Sipe and *W. H. Travers*, for plaintiff in error.

John E. Roller, *O. B. Roller*, and *C. D. Harrison*, for defendant in error.

LEWIS, P., delivered the opinion of the court.

Opinion.

This is the sequel to *Tyler, receiver, v. Sites' Adm'r*, 88 Va., 470. The action was brought to recover damages for the alleged negligent killing of the plaintiff's intestate, a deaf mute, while walking on the ends of the cross-ties on the defendant's tracks. The facts, as they were then presented by the record, were fully set forth in the opinion of the court, delivered by Judge Richardson, on the former appeal; and upon those facts it was held that there could be no recovery. The fact, it was said, that the deceased was deaf made it all the more incumbent upon him to keep a lookout for the train; that to all appearances he was in possession of his faculties; and that the servants of the company had the right to assume, up to the last moment, that he would get out of the way in time to avoid injury.

The judgment was accordingly reversed, and the rule declared to be this: That while a railroad company is bound to keep a reasonable lookout for trespassers on its tracks, and to exercise such care as the circumstances require to avoid injuring them, yet that when an adult person is seen walking on the track, in front of an approaching train, apparently in possession of his faculties, the company has the right to presume that he will seasonably remove himself from his dangerous position, and that if he fails to do so, and is injured, the fault is his own, and the company will be held blameless, in the absence of wilful negligence on its part.

In a recent case in the Supreme Court of North Carolina it was held, in conformity with the rule, that whether the engineer saw the plaintiff at a distance of 150 yards or of 10 feet, he was not at fault in acting on the supposition that she would still get out of the way, and that it was immaterial whether the train was moving fast or slow. *High v. Railroad*, 112 N. C., 385; citing *McAdoo v. Railroad*, 105 N. C., 140; *Meredith v. Railroad*, 108 *Id.*, 616; *Norwood v. Railroad Co.*, 111 *Id.*, 236.

Many other authorities might be cited to the same effect, but it is needless to do so, as the rule is well established in this

Opinion.

State, and upon sound reason. *N. & W. R. R. Co. v. Harmon's Adm'r*, 83 Va., 553, 577.

In the present case the evidence on the second trial, after the case went back to the circuit court, was substantially the same as on the first, except that the plaintiff sought to prove, on the last trial, by the witnesses, Murray and Whitlock, that the deceased, apparently, was not in possession of his faculties at the time of the accident; and to sustain this theory the following question was asked the witnesses—viz: "Was there enough in the appearance of the deceased to indicate to the engine-man that he was not in possession of his faculties?" To which each answered "Yes."

The defendant objected to this evidence, but the court overruled the objection, and allowed the evidence to go to the jury, to which ruling an exception was taken.

We are of opinion that the objection ought to have been sustained. The general rule is that witnesses must testify to facts, and not to opinions; and, although there are exceptions to the rule, the present case is not within any one of them. The ground, moreover, of the witnesses' opinions is anything but satisfactory. In substance it was that the deceased, when seen by them at a considerable distance, immediately before the accident, was walking with his head and body bent forward. "He had his whole body bent," said one of them, "and his walking in that bent position towards the locomotive, and his not getting out of the way, was the indication that he was not in his right faculties." Another witness, however, for the plaintiff, said "he was walking as he usually walked"; and there is not the faintest intimation that he was ever considered apparently "not in possession of his faculties," except that he was a deaf mute, at any time before the accident.

The truth is, he was simply walking, as persons usually walk on the ends of the cross-ties of a railroad, with head and body bent forward, and it would have been remarkable if he had appeared to the engine-man in any other position. This

Opinion.

is clearly brought out by one of the plaintiff's own witnesses, who says: "He was bent over with his head down, *like some one stepping on the ends of cross-ties*, and continued so to walk until he was struck." Another witness on the same side testifies that there was nothing peculiar in his gait or manner, and that when he separated from the witness, a few minutes before the accident, he was in a jovial humor.

But if there was anything peculiar in his movements or appearance, the jury were presumably competent to form a correct conclusion on the subject, unaided by the opinions of others. Undoubtedly there are questions upon which non-experts may give their opinions, as, for example, questions of identity, velocity, distance, and the like, because such questions usually depend upon a variety of circumstances which are incapable of being presented with their proper force and significance to any but the observer; and hence this court has held such evidence admissible on the question of insanity, its value depending upon the intelligence of the witnesses, their means of knowledge, and the reasons they give for their opinions. *Cropp v. Cropp*, 88 Va., 753. But opinions are never received if all the facts can be ascertained and made intelligible to the jury, or if the matter is such as men in general are capable of comprehending and understanding. 7 Am. & Eng. Ency. of Law, tit. "Expert and Opinion Evidence," p. 493.

This rule applies here; for the question was, not whether the deceased was insane, or bereft of his faculties, but whether there was enough in his appearance to indicate any such infirmity on his part to the engine-man; which was a question for the jury to determine for themselves upon the facts of the case, and not upon the opinions of witnesses. To allow a witness to give his own opinion as to one's mental condition is a very different thing from allowing him to say what, in his opinion, some one else ought to have thought about it.

But if the evidence objected to were admissible, it is obvious from what has been said that it would fall short of proving

Opinion.

what it was intended to prove; so that the record shows now, as it did on the former appeal, that the deceased lost his life by his own folly and recklessness, and that his representative has no recourse for damages against the company.

JUDGMENT REVERSED.

Richmond.

WHALEN v. COMMONWEALTH.

MARCH 8th, 1894.

1. CRIMINAL PROCEEDINGS—*Indictment*.—An indictment for larceny of “one paper purporting to be a check for \$125 of the value of \$125 of the goods and chattels of one R., then and there being on the person of said R.,” *held*, sufficient. Code, § 3703.
2. IDEM—*Rule—Value*.—Code, § 3709, providing that in such a prosecution the money due on, or secured by, the writing, and “remaining unsatisfied,” shall be deemed the value of the article stolen, *held*, merely to prescribe a rule for estimating the value of the paper, and not a part of the necessary description of the offence.
3. IDEM—*Proof of value*.—As the law presumes that the face value of the writing is its actual value, *held*, no proof of its actual value is required.
4. IDEM—*Case at bar*.—As the case stands on defendant’s exception to the ruling of trial court overruling his motion for a new trial, which is equivalent to a demurrer to the evidence, and as the commonwealth is entitled to the benefit of all reasonable inferences that can be drawn from the evidence, *held*, the evidence disclosed by the record and set forth in the opinion is sufficient to warrant the verdict of guilty of grand larceny. Code, § 3707, Acts 1893–94, p. 219.
5. IDEM—*Abandonment—Case at bar*.—Fraudulently taking pocketbook from another’s pocket with intent to wholly deprive owner of his property, completes the larceny, though defendant afterwards abandoned it.
6. APPELLATE PRACTICE—*Bills of exception*.—Where no formal bills of exception appear from the record to have been filed to any ruling which was made prior to the rendition of the verdict, *held*, all exceptions, or points saved, during the trial, must be considered as having been abandoned. *Trumbo v. Street Car Co.*, 89 Va., 780.

Argued at Staunton. Decided at Richmond.

Error to judgment of the hustings court of the city of Staun-

Statement—Opinion.

ton, rendered July 10, 1893, in a prosecution against Percy Whalen, whereby the prisoner was sentenced to the penitentiary for a term of five years for larceny from the person. Opinion states the case.

R. S. Ker and R. S. Turk, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LEWIS, P., delivered the opinion of the court.

The prisoner was indicted and convicted of larceny from the person, and sentenced, in conformity with the verdict, to imprisonment in the penitentiary for five years. The indictment charges the larceny of divers United States treasury and national bank notes, and also "one paper purporting to be a check for the payment of one hundred and twenty-five dollars, of the value of one hundred and twenty-five dollars, the goods and chattels of one H. A. Ricketts, then and there being upon the person of the said Ricketts."

The first question is whether the indictment is sufficient. It is contended that the description of the check is too vague and indefinite, and especially because there is no allegation that any part of it remained due and unsatisfied at the time of the alleged larceny. We think this objection is untenable. Section 3708 of the Code provides that "if any person steal any bank note, check, or other writing, or paper of value * * he shall be deemed guilty of larceny thereof, and receive the same punishment, according to the value of the thing stolen, prescribed for the punishment of the larceny of goods and chattels." The offence of stealing a check, or promissory note, or anything of that sort, is altogether statutory, and Bishop lays it down as the established rule that where a statute, simply, and in terms not limited, makes indictable the larceny of "any promissory note," it is adequate to say "one

Opinion.

promissory note for the payment of, &c., of the value of," &c.; and he cites the case of *Commonwealth v. Brettum*, 100 Mass., 206, where the simple description "one promissory note, of the value of," &c., was held sufficient. In that case it was said that as promissory notes are made the subject of larceny by statute, they may be described in the same manner as other things having an intrinsic value; that is, by any description applicable to them as a chattel, and that the defendant has the same protection against a second indictment for the same offence as in other similar cases, as for example, an indictment for stealing a sheep.

Section 3709 of the Code, it is true, provides that in a prosecution like the present, the money due on or secured by the writing in question, "and remaining unsatisfied," shall be deemed to be the value of the article stolen. But this merely prescribes a rule for estimating the value of the paper, and is not a part of the necessary description of the offence prescribed by the preceding sections, although the words "remaining unsatisfied" are usually inserted in the indictment in such cases. Archb. Crim. Pl., 46; 2 Bish. Crim. Proc. (3d ed.), sec. 732; *Adams' Case*, 23 Gratt., 949.

Robinson's Case, 32 Gratt., 866, relied on for the prisoner, is not in conflict with these views. There the indictment simply charged the larceny of "certain paper," without other description, and this was held insufficient. The court said it might have been wall paper or writing paper, or any other kind of paper, thus leaving the defendant uninformed as to the nature of the charge to be answered, which cannot be justly said of the indictment in the present case.

The only other question presented by the record is, whether the trial court erred in refusing to grant a new trial on the ground that the verdict was contrary to the law and the evidence.

The prisoner offered no evidence, and that for the commonwealth is substantially as follows:

Opinion.

On the night of the alleged larceny, Ricketts, a resident of Missouri, and a number of persons, some white and some colored, were drinking in a bar-room in Staunton. Ricketts was "treating," and had been drinking freely. He tendered a twenty-dollar note to the bartender, for which the latter gave him in change three five-dollar notes and some silver. The silver he put in his pocket and the notes in his pocket-book. This was done twice during the evening, and each time Ricketts put the pocket-book in his hip pocket.

Two of the witnesses afterwards saw "a white man" raise his (Ricketts') coat tail while he was leaning, intoxicated, against the bar, and at the same time saw the prisoner take "something black" from his hip pocket and put it into his own pocket. The white man and the prisoner then left the bar-room and went out on the street. One of the witnesses says he started to follow them "to get some of the 'swag,'" but was ordered back by the prisoner. The other witness said he saw them going up the street, "looking over some papers," and that he afterwards heard the white man say, "we robbed an old 'jay' to-night."

A third witness testified that the next morning, upon being applied to by the chief of police to assist in recovering the stolen articles, he sought the prisoner, who told him where he could get "the pocket-book," namely, on the shed at the Chesapeake and Ohio depot, where the witness afterwards found it. Some of the papers had slipped out of the pocket-book, but were found lying near it, and were picked up and put back by the witness. The witness says he told the prisoner that "if the gentleman could get his papers he would let the matter drop." He also said to him, "They are after you," to which the prisoner replied, "I know they are." The evidence is rather obscurely certified, but the inference is irresistible that the witness and the prisoner were talking of Ricketts' pocket-book and its contents as having been stolen the previous night; and as the case stands in this court as on a

Opinion.

demurrer to evidence, the commonwealth is entitled to the benefit of all reasonable inferences that can be drawn from the evidence. The pocket-book was delivered by the witness to Ricketts' counsel, Mr. Curry, who, upon examining it, found that it contained papers that Ricketts had told him were in it, including the check in question. No money was found in it. Ricketts himself was not examined as a witness, but his declarations as to the papers seem to have been received without objection.

The pocket-book was identified by the bartender as the one Ricketts had, the night of the larceny, and also by Scheffer, the proprietor of the Virginia hotel, where Ricketts stopped during his stay in Staunton. The latter witness also testified that Ricketts opened the pocket-book in his presence, before the larceny, and that he observed in it "some papers and money."

Another witness testified that he knew Ricketts, and that he was cashier of the Southern Bank of Mexico, Mo. The check was offered in evidence, and Tams, cashier of the Augusta National Bank, of Staunton, testified that he would have cashed it, at Ricketts' request, if he had endorsed it, and identified himself as the payee named therein. The check was drawn by the assistant cashier of the Southern Bank of Mexico on the Chemical National Bank, of New York, for \$125, payable to the order of H. A. Ricketts.

We are of opinion that this evidence warranted the verdict. The fact that two of the witnesses saw the prisoner take something out of Ricketts' hip pocket, where, a little while before, he had put his pocket-book, coupled with the fact that when asked, the next day, about the pocket-book he (the prisoner) told the witness where it was, who found, at the designated place, Ricketts' pocket-book, containing the check in question, and all the other circumstances of the case, fairly establish the *corpus delicti* and the ownership of the check as alleged in the indictment. The evidence was also sufficient to warrant the

Opinion.

jury in finding that the check was of a value exceeding five dollars, and, therefore, that the prisoner was guilty of grand larceny under the statute. Code, sec. 3707; Acts 1893-94, p. 219. Indeed, no proof of its actual value was required, as *the law* deems it to be of the value expressed on its face. Code, sec. 3709; *Adams' Case*, 23 Gratt., 949.

It was argued that if the accused, in fact, took the pocket-book, the crime of larceny was not complete, because his abandoning it negatives the idea that he took it *lucra causa*, or with intent to convert it or its contents to his own use. But as to this it is enough to say that the taking was fraudulent, and with intent wholly to deprive the owner of the property, and that is sufficient to make out a case of larceny. Archb. Crim. Pl. & Ev., 180.

Complaint is also made of the action of the trial court in regard to the instructions; but there is only one bill of exceptions in the record, and that must be considered as having been taken to the refusal to grant a new trial. That bill embodies the evidence, and also recites that the prisoner excepted during the progress of the trial to the admitting of certain evidence, and to the giving and refusing to give certain instructions. But as no formal bill of exceptions to any ruling which was made prior to the rendition of the verdict was tendered (or, at least, none appears in the record), it follows that all exceptions, or points saved, during the trial must be considered as having been abandoned. *Trumbo's Adm'r v. City Street Car Co.*, 89 Va., 780, and cases cited.

The judgment is affirmed.

JUDGMENT AFFIRMED.

Richmond.

FORBES v. COMMONWEALTH.

MARCH 8th, 1894.

1. CRIMINAL PROCEEDINGS—*Second trial—Objection delayed—Arrest of judgment.*—Where objection is delayed until after verdict to sending to jury indictment endorsed with the verdict of guilty found at first trial, *held*, not error, and if error, the remedy is not by motion in arrest of judgment.
2. IDEM—*New trial—Higher offence.*—Conviction of unlawful shooting is a conviction of a felony, though punished by imprisonment in jail and fine, and after reversal of the sentence, a second trial may be had for the felony and not merely for a misdemeanor, notwithstanding Code, § 4040.

Error to judgment of county court of Appomattox county, rendered at its July term, 1892, in a prosecution against Robert A. Forbes for unlawful shooting with intent to maim, etc. A writ of error to the said judgment having been refused by the judge of the circuit court of the said county, a writ of error was awarded by one of the judges of this court. Opinion states the case.

Thomas N. Williams, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LEWIS, P., delivered the opinion of the court.

The plaintiff in error was indicted at the May term, 1892, of the county court of Appomattox for malicious shooting, and

Opinion.

at the same term was convicted of unlawful shooting, the punishment ascertained by the jury being thirty days' imprisonment in jail and a fine of \$200. The court set aside the verdict, and awarded a new trial, and at the ensuing July term the defendant was again tried under the same indictment. The clerk charged the jury on the second trial to ascertain whether the defendant was guilty of unlawful shooting, and in the event they should find him guilty, then to ascertain his punishment at not less than one nor more than five years in the penitentiary, or, in their discretion, not exceeding twelve months' imprisonment in jail, and a fine not exceeding five hundred dollars. The defendant thereupon moved the court to correct the charge, and to tell the jury that they could not find him guilty of a felony, but only of a misdemeanor; which motion the court overruled, and the defendant excepted.

The trial then proceeded, and again resulted in a verdict of guilty of unlawful shooting, the punishment, this time, being twenty-three days' imprisonment in jail, and a fine of \$100.

The defendant thereupon moved *in arrest of judgment* on two grounds—viz.: 1. Because the indictment was sent to the jury with the former verdict written thereon, and not erased therefrom; and (2) because the indictment was void because not found within the time prescribed by section 4001 of the Code; which motion was overruled, and judgment entered in conformity with the verdict.

It is clear that neither of the grounds upon which the motion was based is well taken. No objection was made before verdict to the jury's taking the indictment, and certainly the court had no power to emasculate the record by erasing therefrom the former verdict. Besides, if there were any merit in either objection, a motion in arrest of judgment was not the proper remedy.

Nor was there error in the action of the court in regard to the charge to the jury. Section 4040 of the Code does, indeed, provide that if a verdict of conviction in a criminal case

Opinion.

be set aside and a new trial granted the accused, "he shall not be tried for any higher offence than that of which he was convicted on the last trial." But this provision has no application to the present case, because the offence of unlawful shooting is a felony, although punishable, in the discretion of the jury, by imprisonment in jail and a fine; so that the accused having been convicted of a felony by the verdict that was set aside, it was not correct to say that he could be tried only for a misdemeanor at the next trial. *Benton's Case*, 89 Va., 570.

JUDGMENT AFFIRMED.

Richmond.

STRODE v. CLEMENT.

MARCH 8th, 1894.

1. **LIBEL—Malice—Privileged communications.**—Mere publication of defamatory words is *prima facie* evidence of malice, but the occasion may rebut the presumption. *Chaffin v. Lynch*, 83 Va., 106.
2. **IDEM—Justification.**—To justify publication of defamatory matter, the occasion must be privileged, and must be used *bona fide* without malice. *Ibid.*
3. **IDEM—Court—Jury.**—Whether the occasion be privileged is a question for the court. Whether the occasion has been used *bona fide* without malice is a question of fact for the jury. *Ibid.*
4. **IDEM—Defamation—Privileged—Case at bar.**—A letter written by one believing he has an interest in the subject matter, stating that the addressee cannot afford to go through life with a breach of trust staining his character, that his books swarm with false entries which he refuses to correct, and that if he fails to properly account and make restitution, the writer will publish the facts in a manner most unpleasant to him: *held*, a privileged communication, and the writer not liable in an action for defamation in writing the letter.
5. **IDEM—Action for defamation—Burden of proof—Case at bar.**—In such action for insults in a letter written on a privileged occasion, the burden is on the plaintiff to prove that the letter was written maliciously, by showing that the defendant availed himself of the occasion, not for the purpose of protecting his interests, but to gratify some ill will independent of such occasion and to defame the addressee.
6. **APPELLATE PRACTICE—Inferences—Verdict.**—Where record shows no conflict in the evidence (or question as to the credibility of witnesses), this court has the same opportunity to draw correct conclusions from the facts as the trial court and the jury possessed.

Error to judgment of circuit court of Amherst county, ren-

VOL. XC—70

Statement.

dered October 14, 1890, in an action for insults, wherein A. H. Clement was plaintiff and H. A. Strode was defendant.

It appears from the record that on the 1st of March, 1889, the parties entered into a contract to conduct a newspaper, owned by the defendant, called the *New Era*, which contract was to continue for one year from that date, but which was afterwards modified and extended till June 30, 1890. By the modified contract the plaintiff agreed to pay the defendant ten dollars a week for his interest under the contract, the plaintiff to have "all other net money." Soon after the modification of the contract the defendant removed to the State of Mississippi, from whence he returned to Amherst county in July, 1890. Soon after his return, in looking over the books of the concern, he discovered many items of "cash received," which had been entered by the defendant, amounting in the aggregate to several hundred dollars, and which, upon inquiry, he was informed did not represent cash actually received, but that the plaintiff had closed accounts to that amount, taking notes payable to himself, and entering the transactions as so much cash received. The defendant thereupon demanded that the plaintiff surrender the notes to him, which was refused. Some of the accounts which were thus closed were due to the *New Era* before the plaintiff's connection with the paper. He however, claimed that these had been "compensated for by other accounts for subscriptions which were begun and partly earned during his connection with the paper." The defendant then employed counsel to confer with the plaintiff, but the parties not coming to any agreement, the defendant published a notice in the Lynchburg newspapers to the effect that the plaintiff had no right to the notes, and warning debtors not to pay him. About the same time he addressed to the plaintiff the letter complained of, which is as follows :

Statement.

“AMHERST C. H., VA., JULY 14, '90.

“Mr. A. H. Clement :

“Dear Sir :

“I leave home to-day for an absence of several days. I wish you seriously to consider whether you can afford to go through life with a breach-of-trust taint on your character for the imaginary benefit you may have in holding on to paper which you can never collect.

“At your request I omitted the weekly inspection of the books of the *New Era* through Mr. Scott as I at first proposed, and in return you hand me over the books in a condition which will blast you for life, as they swarm with false entries, which you refuse to correct. You are young and inexperienced, and no doubt are advised by those who care nothing for the effect upon yourself provided trouble can be given to me.

“The offer I made you was generous towards you beyond reason, and even after you had broken a second contract.

“The return for the trust I placed in your keeping is conduct which must end in the total ruin of your reputation. The further steps which will become necessary in protecting the innocent parties in this matter will necessitate publication in the Lynchburg papers most unpleasant to you, if you have any of the feelings of a sensitive man.

“I leave to Judge Brown the settlement of this matter in my absence, with recommendation of you to his mercy.

“Yours truly,

“H. A. STRODE.”

At the trial the only witness examined was the plaintiff himself, and after the evidence had been closed, the court instructed the jury as follows :

“If the jury believe from the evidence that the defendant wrote the letter of July 14, 1890, for the purpose of inducing

Statement—Opinion.

the plaintiff to surrender the notes which he had taken payable to himself, and that the defendant honestly believed he was entitled to said notes, then the said letter is a privileged communication, and the jury must find for the defendant, unless they believe that the said letter (although privileged) contains language which was not justified by the circumstances, and which was unnecessarily insulting, so as to amount to an abuse of the defendant's privilege to communicate with the plaintiff touching said notes, and was malicious, then the jury must find for the plaintiff, if they believe that the words contained in said letter, from their usual construction and common acceptance, are construed as insults, and tend to a breach of the peace."

To the giving of this instruction the defendant excepted.

The jury returned a verdict for the plaintiff for \$900 damages, upon which the judgment complained of was entered.

J. Thompson Brown and Geo. M. Cochran, for plaintiff in error.

Caskie & Coleman, for defendant in error.

LEWIS, P., delivered the opinion of the court.

The question to be determined is whether the letter of the defendant to the plaintiff, upon which the action is based, is a privileged communication; and that depends (1) upon whether it was written on a privileged occasion; and if so, then (2) upon whether the occasion was used *bona fide* and without malice.

Ordinarily the law implies malice from the use of words defamatory or insulting. But the presumption is the other way where the occasion of the publication is privileged, and the *onus* is then upon the plaintiff to prove malice in fact. Where the defendant acts in performance of a duty, legal or social, or in defence of his own interests, the occasion is privileged; and since the case of *Toogood v. Spyring*, 1 C., M. & R., 181, was decided, it has been settled law that a communication

Opinion.

made by a person in the conduct of his own affairs, where his interest is concerned, is privileged, if without malice. Whether or not such an interest exists as to make the occasion privileged is a question for the court, and if the occasion be held privileged, then it is for the jury to say whether it was used *bona fide*; and if found to be so, then the communication is privileged, and no action can be maintained upon it.

This was well expressed by the New York Court of Appeals in *Klinck v. Colby*, 46 N. Y., 427, where it is said: "The court may determine whether the subject-matter to which the alleged libel relates, the interest in it of the defendant, or his relations to it, are such as to furnish the excuse. But the question of good faith, belief in the truth of the statement, and the existence of actual malice remains for the jury." And in the same case it was said that where both the party making and the party receiving the communication have an interest in it, it has never been doubted that the communication, if made without actual malice, is protected.

It has been said by an eminent English judge that the rule leaving it to the court to decide whether the requisite interest or duty exists to make the occasion privileged, is an anomaly, on the ground that that question, like the question of honesty of purpose, which belongs to the jury, is purely a question of fact. But the existence of the rule was not denied, nor can it be successfully.

In some jurisdictions when the facts are uncontroverted, the court determines whether or not the communication is privileged—i. e., the case is withdrawn from the jury—but with us the practice is to submit to the jury the question of malice, where the occasion is privileged. Townsh. Sland. & L. (4th ed.), sec. 288; *Chaffin v. Lynch*, 83 Va., 106; S. C., 84 *Id.*, 884.

It was, therefore, error on the part of the trial court in the present case to leave to the jury the question whether the defendant had an interest in the subject matter of the communication in question; or, in the language of the instruction,

Opinion.

whether he "honestly believed he was entitled to the said notes"; for whether he had an interest or not, or, in other words, whether or not the occasion was privileged, was a question for the court to determine for itself; and we are unable to say that the jury were not misled by the instruction in the form in which it was given. If the defendant was not warranted in believing that he had an interest, the case was one of ordinary defamation, and the only question, apart from the question of damages, to be submitted to the jury was whether the words used were such as are usually construed as insulting and tending to violence and breach of the peace. *Chaffin v. Lynch, supra.*

But further than this, there was error in refusing to set aside the verdict, on the ground that it was not warranted by the evidence.

As a matter of fact, it is clear that the defendant honestly believed he had an interest in the notes, and that his object was to induce the plaintiff to surrender them. Indeed, some of the notes were taken for accounts due before the plaintiff became connected with the *New Era*, and in which, for aught the record shows, he had no interest; and although he testified that "these were compensated for by other accounts for subscriptions," in which he had an interest, yet there is no proof that he was authorized to act for the defendant in any matter originating before the contract of March, 1889. It is true he says the defendant never questioned his right to collect such accounts, but the defendant knew nothing of his taking notes to himself for any such accounts before his return from Mississippi, in July, 1890, when he promptly denied the plaintiff's right to do so.

In the next place, the letter having been written on a privileged occasion, it was incumbent on the plaintiff, according to the principles already stated, to repel the presumption that it was written without malice, by showing that the defendant availed himself of the occasion, not for the purpose of protect-

Opinion.

ing his interests, but to gratify some ill will independent of the occasion, and to insult the plaintiff.

Now, there is no extrinsic evidence of malice, such as an antecedent grudge, or previous disputes, or anything of that sort, between the parties; but the contention is that the language used by the defendant is of itself evidence of malice. Undoubtedly strong or violent language disproportioned to the occasion may raise an inference of malice, and thus lose the privilege that otherwise would attach to it. But when the occasion is privileged the tendency of the courts is not to submit the words to a too strict scrutiny, but rather to view them in the light of the facts as they appeared to the defendant; for the question is, not whether the imputations are true, but whether the words are such as the defendant might have honestly employed under the circumstances. *Odger's Lib. and Sland.*, 277; *Spill v. Maule*, L. R., 4 Exch., 232; *S. C.*, 20 L. T., 675; *Clark v. Molyneux*, 3 Q. B. Div., 237.

Now, in the case at bar, the parties differed radically as to their respective rights under the contract in question. The plaintiff contended that he had a right to take notes or bonds payable to himself for all outstanding accounts, which the defendant as strenuously denied, especially as regarded accounts due before the date of the contract. Which was right, or what is the proper construction of the contract, it is not necessary to inquire, for be that as it may, under the circumstances of the case, who can say that the defendant might not have honestly written the letter in question, wherein he speaks of a "breach of trust," making "false entries," etc.? The plaintiff admits he made entries on the books as of "cash received," when in fact no money was collected, but notes were taken in his own name; and, while he explains that, in his opinion, he had the right to do this, it is equally certain that the defendant thought differently. And so when he testified that the imputations contained in the letter were "untrue and unfounded," that was merely his own version of the matter; and, besides, if the defendant in good faith believed them to

Opinion.

be true, that ought to have ended the case. *Chaffin v. Lynch*, 84 Va., 884; *Clark v. Molyneux*, 3 Q. B. Div., 237.

The case of *Spill v. Maule*, in the Exchequer Chamber, before referred to, is much in point. There the defendant, who was interested as a creditor of a firm of which the plaintiff was a member, wrote another creditor of the firm that the plaintiff had been guilty of "most disgraceful and dishonest" conduct, which had resulted in materially diminishing the assets of the concern. In an action for libel it was held that although the language used was strong, yet the occasion was privileged, and therefore the defendant, in the absence of proof to the contrary, must be presumed to have honestly believed in the truth of what he wrote, and hence there could be no recovery. "It is not for us to say," said Lord Chief Justice Cockburn, "whether the plaintiff acted honestly or dishonestly; with propriety or disgracefully. All that we have to look to is whether or not there is a valid legal presumption that the defendant only stated that which he honestly believed; and if there be, then he would not be liable in this action, and, in the absence of positive proof to the contrary, there would be nothing to go to the jury."

Applying this test to the present case, we are of opinion that the verdict ought to have been for the defendant; that is to say, the presumption that he acted without malice is not rebutted by the evidence. We come to this conclusion with the less hesitation because here there is no conflict of evidence, or question as to the credibility of witnesses. Only one witness was examined, and from his evidence the facts of the case appear, thus affording the appellate court the same opportunity to draw correct conclusions as the trial court and the jury possessed. *Fisher v. Vanmeter*, 9 Leigh, 18; *Slaughter v. Tutt*, 12 Id., 147, 160.

The judgment must, therefore, be reversed, and the case remanded for a new trial.

JUDGMENT REVERSED.

Richmond.

MAGARITY v. SUCCOP'S ADM'R.

MARCH 8th, 1894.

1. SETOFFS.—Defendant in creditors' suit cannot setoff notes placed in his hands for collection, and if not collected to be returned to the owner, and which never became defendant's property.
2. COMMISSIONER'S REPORT—*When not disturbed*.—A question of fact determined by commissioner upon contradictory evidence, and approved by lower court, cannot be disturbed on appeal, unless the error be palpable.

Appeal from decree of circuit court of Fairfax county, rendered at its June term, 1891, in a cause wherein B. W. Moore, administrator of John R. Succop, deceased, and all other creditors of Jonathan Magarity and Frances Ann Magarity who should come in, &c., were complainants, and said Magarity and wife were defendants. The decree being adverse to the defendants, they appealed. Opinion states the case.

John Critcher, for appellant.

R. W. Moore and *W. Willoughby*, for appellees.

LACY, J., delivered the opinion of the court.

The original bill was filed in April, 1884, by R. W. Moore, administrator of John R. Succop, deceased, on behalf of himself and all other creditors of Jonathan Magarity and Frances Ann Magarity who should come in on the usual terms, to subject

Opinion.

the property of the said Jonathan Magarity to his debt, and all other debts established against it; the said property having been conveyed by the said Jonathan Magarity to his wife, Frances Ann, subject to his debts, by deed dated the 26th day of January, 1884. Other creditors came in by petition, and many of them were paid and satisfied. Among the petitioning creditors were the appellees, John J. Shipman and his wife Priscilla, and Andrew J. Shipman; and it is concerning their claims that this controversy is continued here by this appeal. Magarity filed offsets to the claims of the said Shipman and others, and some were allowed, and others rejected, and decree rendered upon consideration of the evidence, and of sundry commissioners' reports filed in the cause, in favor of Shipman. And Magarity applied for and obtained an appeal to this court, wherein he assigns errors; and the appellees, under rule 9 of this court, assign sundry errors in their behalf, which will be considered in due course.

The first error assigned by the appellant is the rejection by the court of certain offsets offered by him, called and known in the record as the "Patch Notes," of \$50 and \$500. The next is that the court rejected the offset of the Fletcher judgment against Shipman, which was assigned to Magarity. The next assignment of error is that the court rejected the amount of \$1,330 paid E. O. Hine in a suit against Magarity by Hine. The next is the action of the court in allowing Shipman credit for the sum of \$268 83 overpayment of costs, with interest, making \$284 95. The appellee assigns as error against him that the court allowed Magarity credit of \$250, a note alleged to be lost, and not produced, and for the disallowance by the court of the Stilson claim, assigned to Shipman and wife, in part, it being claimed that too little was allowed. The appellant also assigns at bar another error, not set forth in his petition, the allowance of a judgment recovered in the Supreme Court of the District of Columbia by Shipman against Magarity, for \$100.

Opinion.

As to the first assignment of error by the appellant—the rejection of the Patch notes as offsets—there is no error. The evidence shows that these notes had never become the property of the appellant. They were in the hands of Magarity for collection, and, if not collected, to be returned to Patch, as is shown by the evidence. See *Wat. Setoffs*, § 53.

As to assignment as to the Fletcher judgment, the setoff was properly rejected, the Fletcher judgment having been annulled on appeal to this court. See *Shipman v. Fletcher*, 83 Va., 349.

The rejection of the setoff of the Hine judgment is plainly right. Hine had a claim against Magarity, which he recovered. The judgment was not against Shipman, and was not connected with him in any way. Magarity employed Hine in the contractor's work, and Magarity discharged him; and Hine sued Magarity, and had a recovery. Nobody but Magarity has set up any claim on Hine's behalf against Shipman, who was not connected with the work on the piles while Hine was employed there.

As to the contention of the appellant as to the item of \$268 83 with interest, making \$284 95, the claim is that this is twice charged against appellant, and the argument is that No. 14 in the report is an overpayment of costs in equity suit No. 7,746, D. C., \$268 83, and No. 4 in the commissioner's report is a judgment in Fairfax circuit court, \$194 41 interest, and is not \$268 23, and the two are identical; the recovery in one court having been sued on in the other, and both recoveries for the same thing. This is a question of fact. The point is not made by exception in this form before the commissioner or the lower court. No. 14 was not excepted to at all, and the No. 4 was excepted to for other reasons; that is, to its allowance as a debt at all. It was determined by the commissioner upon contradictory evidence, and approved by the lower court, and cannot be disturbed here, unless an error be palpable. *Magarity v. Shipman*, 82 Va., 784; *Bowers v.*

Opinion.

Bowers, 29 Gratt., 697. The same may be said, and is equally conclusive, as to the fifth assignment of error.

The exceptions of the appellees as to the lost note, and as to the allowance of too little in the Stilson claim, may be considered together. Upon the evidence, these appear to have been very confusing to the commissioner; and he hesitated to come to any conclusion, and failed to do so, in his first report. But upon a recommittal he reported as is here complained of, and the circuit court sustained him. The lost note may have before allowed in the numerous controversies between the parties, but it is not made to clearly appear so; and the Stilson claim, considered from one side only, may have been improperly largely discredited. But the commissioner has so reported as stated, and the trial court confirmed his action; and unless error is palpable and obvious, and the result arrived at is without evidence to support it, or plainly against the evidence, the appellate court must affirm it. *Magarity v. Shipman*, 82 Va., 787.

Upon the whole case, and on all points, we are of opinion to affirm the decree of the court below as without error.

DECREE AFFIRMED.

Richmond.

GINTER v. BREEDEN.

MARCH 8th, 1894.

1. **LACHES—Loss of evidence—Limitation.**—Delay of twenty-six years in bringing suit to enforce a vendor's lien, where the delay is explained by the loss of the court records and the destruction of the creditor's books showing the existence of the lien, *held*, will not prevent a recovery. And there is no limitation to the life of such lien saving that arising from presumption of payment from lapse of time. *Tunstall v. Withers*, 80 Va., 892.
2. **IDEM—Presumption of payment—Stay law.**—Where vendor's lien accrued in 1860, the stay law period must be excluded from the twenty years necessary to create the presumption of payment, and no such presumption had arisen when this suit was brought in 1888.
3. **ASSIGNOR—Declarations.**—Declarations, either oral or written, of assignor that a chose in action had been paid, *held*, inadmissible unless made before the assignment thereof. *Wilcox v. Pearman*, 9 Leigh, 146; and the same is true as to vendor of property after sale as against vendee thereof.
4. **WITNESSES—Incompetency.**—Where one of the contracting party dies, the opposing party cannot testify, and his incompetency renders the co-contractors of the decedent incompetent, and also their assignee, and the heir of any deceased assignee, who is a party to the suit and who is interested in the result. *Mason v. Wood*, 27 Gratt., 783.
5. **EXCHANGE OF LANDS—Liens—Case at bar.**—In 1859, by written contract, H. and B. exchanged lands, B. giving bonds for boot. H. sold his tract to G. and I., taking their bonds. No conveyances. H. assigned some of the bonds to plaintiff. Then H., G., I., and B.'s widow essayed to annul the exchange, the sale, and the bonds. H. took his former land back, and sold it to L. on condition he would assume payment of B.'s bonds, and the widow took possession of B.'s former land; but no care was taken of the assignee's interests :

HELD:

The assignee can subject H.'s former land to the lien of B's bonds, and B.'s former land to the lien of the bonds of G. and I.

Appeal from decree of circuit court of Rockingham county, rendered October 28, 1890, in two causes, heard together, of John E. Roller and others, complainants, against George W. Breeden and others, defendants, and of John E. Roller and others, complainants, against William Breeden's administrator and others, defendants. Ginter came into these causes by petition. The decree being adverse to the complainants, they appealed. Opinion states the case.

John E. Roller, for appellants.

Sipe & Harris, for appellees.

FAUNTLEROY, J., delivered the opinion of the court.

It appears from the record, that, on the 16th day of March, 1859, William Breeden was the owner of 500 acres of mountain land in Page county, Virginia; and, on the same day, Simeon J. Harnsberger was the owner of a tract of 244 $\frac{1}{2}$ acres of land in Rockingham county, Virginia. On the said 16th day of March, 1859, the said William Breeden and Simeon J. Harnsberger made a trade or exchange of the said two tracts of land, by the operation of which exchange, William Breeden became the owner of the 244 $\frac{1}{2}$ acre tract in Rockingham county, and Simeon J. Harnsberger became the owner of the 500 acre tract in Page county. The 244 $\frac{1}{2}$ acre tract, which had belonged to Simeon J. Harnsberger, being far more valuable than the 500 acre tract which had belonged to William Breeden, the said William Breeden agreed to pay boot money, and duly executed and delivered his several bonds to Simeon J. Harnsberger for instalments of said boot money, reciting in said bonds the consideration as being for land purchased by him of the said S. J. Harnsberger. These bonds were as follows: One for \$110, due April 14th, 1860, with interest from date; one for \$146 66 $\frac{2}{3}$ —100, due April 14th, 1861, without interest till

Opinion.

due; one for \$73 33 $\frac{1}{3}$ -100, due April 14th, 1861, without interest till due; one for \$220, due April 14th, 1862, without interest till due; one for \$220, due April 14, 1863, with interest from April 14th, 1762; one for \$120, due April 14th, 1864, without interest till due. In addition to these writings obligatory from William Breeden to Simeon J. Harnsberger, the said contracting parties entered into a contract in writing, which recited the exchange of the two tracts aforesaid, describing each of them, and stipulating that the said Simeon J. Harnsberger was, at the time of signing, entitled to a deed for the 500 acre tract of land in Page county; and that as soon as Breeden has paid the first one of his said bonds he would be entitled to a deed for the 244 $\frac{1}{2}$ acre tract in Rockingham county with retention of vendor's lien for the further payments. This contract, in writing, was signed and sealed by the said parties on the 16th day of March, 1859.

On the 25th day of September, 1860, the said Simeon J. Harnsberger sold the said 500 acre tract of land in Page county to George W. Breeden and J. M. Breeden, and took from them four bonds of \$66 66 $\frac{2}{3}$ -100, payable in one, two, three, and four years, with interest from date, said bonds reciting that they are for land.

No formal deeds were executed by either William Breeden to S. J. Harnsberger, or S. J. Harnsberger to William Breeden, or from S. J. Harnsberger to George W. Breeden and J. M. Breeden.

Of the aforesaid six bonds executed by William Breeden to Simeon J. Harnsberger for boot money, the first three have been paid; of the last three bonds, two for \$220 each, were assigned by S. J. Harnsberger to M. M. Sibert, and by Sibert to petitioner Ginter; and upon these said first two bonds judgment was rendered in the county court of Rockingham county at the May term, 1868.

The remaining bond for \$120 was assigned by S. J. Harnsberger to M. M. Sibert, and by Sibert to John E. Roller, and

Opinion.

this also remains unpaid. Of the four bonds executed by George W. Breeden and J. M. Breeden to S. J. Harnsberger for the purchase of the 500-acre tract of land in Page county, none have been paid, but were assigned by S. J. Harnsberger to M. M. Sibert; and by Sibert two of these bonds were assigned to petitioner Ginter, who obtained judgment upon them at the April term, 1868, of the county court of Rockingham county. The remaining two of the said four purchase-money bonds were assigned by M. M. Sibert to John E. Roller.

Upon the commencement of the late civil war the said William Breeden entered the Confederate army, and in the early part of the war he died. Thereupon his widow, who was his second wife, and the heirs undertook (as the defendants alleged and tried to prove by what the petitioner claims was an incompetent witness and by illegal and inadmissible testimony) to cancel and rescind the aforesaid contract of exchange of lands between William Breeden, then deceased, and S. J. Harnsberger, the said S. J. Harnsberger consenting to the said annulment and rescision of the said contract of exchange; and upon the payment by John K. Long, or the assumption by him, of the Breeden bonds, the said S. J. Harnsberger placed the said John K. Long in possession of the 244 $\frac{1}{4}$ -acre tract of land in Rockingham county, and, at the same time, the contract of sale between the said S. J. Harnsberger and George W. and J. M. Breeden for the purchase by them of the 500-acre tract of land in Page county, was also rescinded, and the said widow and heirs of William Breeden were placed in possession of said 500-acre tract. But in neither case did the said S. J. Harnsberger or the widow and heirs of William Breeden, deceased, or George W. and J. M. Breeden, take care of the interest of the assignee of the said S. J. Harnsberger, the said M. M. Sibert, or those holding the said purchase-money bonds under him. During the civil war a large portion of the records of Rockingham county were destroyed by the federal army, and it was not until a chancery suit involving the estate

Opinion.

of S. J. Harnsberger, then recently instituted, disclosed a clue to the evidence of these debts and those assignments, that these suits were instituted to January rules, 1888.

The circuit court, upon the final hearing, overruled the exceptions taken by appellant to the competency, as a witness, of the daughter and heir of one of the parties to these transactions, one John K. Long, whose administrator and heirs are parties to these causes, and admitted her testimony, but sustained the exceptions taken to the report of the master which established the lien upon the 500-acre tract of land in Page county of the two purchase-money bonds for \$66 66 $\frac{2}{3}$ each, held by appellant, and also of the two like bonds of like amount held by J. E. Roller as assignee; and also the lien upon the 244 $\frac{1}{4}$ -acre tract in Rockingham county of the two bonds of \$220 each, held by appellant as assignee, and also of the \$120 bond held by John E. Roller as assignee; and thereupon decreed a firm and stable title to the 500-acre tract of the land in Page county to and in the widow and heirs of William Breeden, deceased; and also a firm and stable title to the 244 $\frac{1}{4}$ -acre tract of land in Rockingham county in and to John K. Long and his vendees; and decreed costs to the defendants in each cause, and dismissed them from the docket.

The circuit court erred in overruling the exception to the competency of Mary A. Haney, the daughter and heir of John K. Long. The deaths of William Breeden and S. J. Harnsberger had made M. M. Sibert and his assignees, including appellant, incompetent; and their incompetence had, in turn, made the parties opposing them in interest, incompetent. See *Mason v. Wood*, 27 Gratt., 783. She was also incompetent because of the interest of herself and husband in the real estate descended to her from the estate of her father, John K. Long, deceased. And, having had children born alive, her husband had an estate of curtesy. She was incompetent upon both grounds; but all she attempts to prove are certain alleged declarations made by Simeon J. Harnsberger to the effect, that the contract between

Opinion.

him and William Breeden, deceased, had been rescinded. These declarations, even if proved by competent witnesses, cannot be admitted, as against his own assignees. See *Wilcox v. Pearman*, 9 Leigh, 146.

Simeon J. Harnsberger is dead, and is not here to protect, either his own reputation as an honest man, or the interest imparted by him to his assignee; and it is not to be assumed that he did a deliberate and conscious wrong to his own assignee. The declarations of a vendor of property, real or personal, (nor of the assignor of a chose in action) cannot be given in evidence against a party who had *previously* acquired his title by assignment from him. It would be vicious and dangerous to permit the vendor or assignor thus to defeat the right or title which he had conveyed or assigned to another, and thereby to deprive that other of the protection to be derived from a cross-examination. *Pettit v. Jennings*, 2 Rob. Reports, 676.

In *Wilcox v. Pearman*, 9 Leigh, 146, Judge Tucker, delivering the unanimous opinion of the court, said: "The acknowledgment of an assignor that he had been paid his debt is no evidence against the assignee unless it was made anterior to the assignment; and this is equally true whether his acknowledgment is oral or written. Now a receipt is nothing but a written acknowledgment, and is not evidence against the assignee, unless it is proved to have been given anterior to the assignment. The proof of this is upon the debtor. It was argued that the date of the receipt must be taken as the true date until the contrary is proved. I cannot think so. If it were so, every such paper would prove itself, which cannot be. Moreover, the parties to it know truly when it was given; the assignee cannot know. The parties to it must, therefore, prove it; since otherwise, however false and fraudulent it be, it will prove itself to be true, without the possibility of contradiction."

The alleged contract of rescission is proved only by the witness Mary E. Haney, a daughter and heir of John K. Long,

Opinion.

deceased, who is an incompetent witness by the death of parties to the transaction, and by the other disqualifying circumstances hereinbefore set forth. She is pecuniarily interested in the result of this suit; and, as heir of her father, John K. Long, deceased, she is liable to the extent of assets received from his estate, and her husband is interested with her in these assets. All that she testifies to are the declarations of S. J. Harnsberger, who is dead; and even if they were made, as alleged, they were made after the death of William Breeden, and were not made in the presence of Harnsberger's assignees, the holders for value of the purchase-money bond given by William Breeden to S. J. Harnsberger for exchange of land as boot money, and secured by vendor's lien upon the land.

In *Daley's Ex'or v. Walden*, 80 Va. (5 Hansbrough), 572, it was held that an assignment of a chose in action need not, in Virginia, be recorded; and that declarations made and letters written by the assignor subsequent to the assignment are inadmissible as against his assignee. At the death of William Breeden—previous to the alleged contract of rescission—all his real estate became assets for the payment of his debts, and the rights of his creditors had attached to his property, real and personal. And S. J. Harnsberger could not assume possession or control of these assets, and enter into a contract with William Breeden's widow and heirs, by which he could exclude his own assignees and deprive them of their vendor's liens, and then sell the land to John K. Long. At least four of the bonds for the purchase money of the land sold to William Breeden by S. J. Harnsberger, and by him assigned to M. M. Sibert, had not even matured at that date (1861) but fell due in April and September, 1863 and 1864. See *Lewis v. Overby*, 31 Gratt., 619; *Ryan v. McLeod*, 32 Gratt., 174; *Scott v. Ashlin*, 85 Va. (10 Hansbrough), 588.

The circuit court erred in holding that the alleged contract of rescission of the exchange of lands between William Breeden and S. J. Harnsberger was legally and sufficiently proved; and

Opinion.

in sustaining the exceptions filed by the defendants to the master's reports, which had sustained the claim of the appellant as assignee of the vendor's lien bonds, and established them as liens upon the tracts of land in controversy; and the circuit court erred in not holding that all the assets of the estate of William Breeden, deceased, including the Rockingham tract of land, are liable for the payment of his debts; and in not holding that the rights of the appellant as the assignee and holder of the purchase-money bonds against the estate of William Breeden, deceased, and also of the bonds given for the sale of the Page tract of land, are superior to the rights and equities of his heirs at law; and the decree giving them a valid title to the Page tract of land, and giving to their vendees, the heirs of John K. Long, deceased, a valid title to the Rockingham county land, without providing for the payment of these assigned purchase-money bonds is unjust and erroneous.

The defence of *laches* is set up. The debts sought to be enforced in this suit are valid and subsisting debts evidenced by purchase-money bonds and vendor's liens, and they are not barred by statute of limitations, or by the presumption of payment. In the case of *Tunstall v. Withers*, 86 Va. (11 Hansbrough), 952, declares that there is no limitation to the life of a vendor's lien, save that arising from the lapse of time sufficient to create a presumption of payment. In that case the vendor's lien accrued in 1860, and suit was not brought until 1886; and yet it was held that neither the statute of limitations, nor presumption of payment, nor *laches* affected the lien. Under the authority of that case, we must exclude the period of the stay law, from the twenty years necessary to create the presumption of payment; and this suit was brought in the court below more than a year before the expiration of that time. *Laches*, and even gross *laches*, is not enough to raise a presumption of the payment or the abandonment of a vendor's lien; it must be *gross laches unexplained*, together with evidence affording the presumption of abandonment of the right.

Opinion.

In the case at bar, not only is there no such lapse of time, but the delay in bringing the suit is explained. The destruction of the court records of Rockingham county; the removal of appellant's former attorney from the State to the Pacific coast, and the destruction of Major Ginter's books are ample explanation of the difficulties and delay in bringing the suit.

For the foregoing reasons we are of opinion that the decree complained of is erroneous, and it must be reversed and annulled.

· DECREE REVERSED.

Richmond.

CALLAHAN v. YOUNG, CLERK.

MARCH 8th, 1894.

1. **CONDITIONAL SALES**—*Void unless recorded*.—A conditional sale of goods reserving title to seller is void as to creditors of, and purchasers from, purchaser without notice, unless recorded. Code, § 2462.
2. **IDEM**—*When to be recorded*.—Clerk is required to admit to record a writing as to any person whose name is signed thereto, when same has been acknowledged by him, or proved as to him by two witnesses in court or before clerk in his office. Code, § 2500.
3. **IDEM**—*Memorandum*.—Acts 1889-'90, p. 108, amending Code, § 2462, provides that clerk shall from the original contract, docket and index a memorandum setting forth the date thereof, the amount due therein and a brief description of the goods, and that such docketing and indexing shall have the same effect as if the contract were recorded according to Code 1887, chapter 109.
4. **MANDAMUS**—*Case at bar*.—In the case here, *held*, a *mandamus* will not be awarded to compel the clerk to docket and index such memorandum unless the original contract has been produced before him and proved or acknowledged as prescribed by law.

Error to judgment of corporation court of Norfolk, rendered April 19, 1893, in a *mandamus* proceeding, wherein Robert Callahan was petitioner and W. A. Young, clerk of said court, was defendant. The court refused the writ, and dismissed the petition, by the judgment complained of. Opinion states the case.

Meredith & Cocke and *Smith & Moncure*, for plaintiff in error.

No counsel for defendant in error.

Opinion.

LEWIS, P., delivered the opinion of the court.

The appellant filed his petition in the court below for a *mandamus*, which was refused. The petition states that on the 17th of April, 1893, the petitioner sold and delivered to one Thompson, in the city of Norfolk, a cash register, upon certain terms and conditions, evidenced by a contract in writing executed by the parties. A copy of the contract is exhibited with the petition from which it appears that the terms of the sale were \$200, of which fifty dollars were to be paid on delivery of the register, and twenty-five dollars per month thereafter until the whole purchase money should be paid, the title in the mean time to remain in the vendor. It is also alleged that upon application to the defendant, clerk of the corporation court of Norfolk, to docket a memorandum of the contract, the application was refused, on the ground that the contract had not been acknowledged or proved, as required by section 2500 of the Code. And upon this ground, which was also set up as a defence in the answer, the court below refused to award a *mandamus* to compel the clerk to docket a memorandum of the contract, as prayed in the petition.

Section 2462 of the Code provides that "every sale or contract for the sale of goods or chattels, wherein the title is reserved until the same be paid for in whole or in part, or the transfer of the title is made to depend on any condition, and possession be delivered to the vendee, shall be void as to creditors of, and purchasers for value without notice from, such vendee, unless such sale or contract be evidenced by writing executed by the vendor, in which the said reservation or condition is expressed, and until and except from the time the said writing is duly admitted to record in the county or corporation in which said goods or chattels may be," etc.

And section 2500 provides that, except where otherwise provided, the court, or the clerk in his office, shall admit to record any writing which is to be or may be recorded as to any person

Opinion.

whose name is signed thereto, "when it shall have been acknowledged by him or proved by two witnesses as to him in such court, or before such clerk in his office."

In the present case the contract in question was not acknowledged by the parties, or either of them, nor proved by witnesses, as the answer states. The appellant, however, contends that it was the duty of the clerk to docket a memorandum of the contract without such acknowledgment or proof; and this contention is based upon the recent statute amending section 2462 of the Code.

That statute requires the contract in a case like the present to be in writing and to be executed by both vendor and *vendee*, and provides further that it shall be void, &c., "until and except from the time that a memorandum of said writing, setting forth the date thereof, the amount due thereon, and a brief description of said goods and chattels, be docketed" in the clerk's office. The clerk is required to "docket and index the same from the original contract * * * and to endorse on such contract the words 'memorandum docketed,' for which services he may charge not exceeding twenty-five cents; and then it is provided that "the docketing and indexing of such memorandum * * * shall have the same effect * * * as if said contract were recorded according to the provisions of chapter 109 of the Code." Acts 1889-'90, p. 108.

The point made by the appellant is that inasmuch as this statute authorizes the docketing of a memorandum, and does away with the necessity of recording the contract itself, section 2500 of the Code has no application to the case, as that section applies only where a *writing* is to be recorded.

There is undoubtedly a technical distinction between recording a writing and docketing a memorandum of such writing. In the latter case a brief abstract of the writing is recorded, while in the former the writing, as in the case of an ordinary deed, is inscribed in full. But the question here is, What was the intention of the legislature? As the clerk is to docket

Opinion.

and index the memorandum from the original contract, how is the contract to be authenticated? And as both vendor and vendee must execute the contract, could the legislature have intended to require the clerk to docket a memorandum as to both parties upon the verbal request of either, without other evidence of the authenticity of the contract? We think not.

Docketing a memorandum is made a substitute for recording the contract in full, but not a necessary one, as the contract may still be recorded as before the passage of the amendatory statute. This is deducible from the provision that the docketing and indexing of a memorandum shall have the same effect as if the contract were recorded under chapter 109; and to record the contract it must be acknowledged or proved as required by section 2500; and as the production of the contract is now the foundation for the docketing of the memorandum, the true interpretation, in the absence of a clear legislative intent to the contrary, would seem to be that the contract, when produced for that purpose, must be authenticated in the same manner as when produced for recordation.

No doubt the object of the legislature was to save expense to the parties by allowing an abstract of the contract to be recorded in place of the contract itself; and as the abstract or memorandum is to be made from the original contract, the docketing of a memorandum is the recording of the substance of the contract, and, therefore, the recording of a writing within the meaning of the law.

The judgment of the lower court, being in conformity with these views, must be affirmed.

JUDGMENT AFFIRMED.

Richmond.

WALKER v. LEWIS.

MARCH 15th, 1894.

1. *WILLS—Construction—“Son”—Estates tail.*—The word “son,” in its technical sense, is a word of purchase, and must be so construed, unless in the context there is something to the contrary. Nor since the act abolishing entails can a testator be presumed to intend to create an estate tail unless he uses such words as created such estate without implication.
2. *IDEM—Estates tail—Shelley’s case.*—A devise of lands to one for life, and after his death to his sons and their heirs forever, to be equally divided among them, but in case of his dying without leaving a son or son’s son who can take, then to other designated persons, does not under the rule in *Shelley’s Case* create a fee tail in the first devisee, which becomes converted by statute into a fee simple. *Taylor v. Cleary*, 29 Gratt., 448.
3. *IDEM—Contingent fees—Perpetuities.*—Two contingent fees by way of remainder may be limited as substitutes or alternatives one for the other, the latter to take effect in case the prior one fails to vest in interest, and is immediately avoided upon the first so vesting, it being limited to vest in interest within a life or lives in being and twenty-one years and ten months thereafter.

Appeal from decree of circuit court of Danville, rendered June 13, 1891, in the consolidated causes of Drumgold against Lewis and Walker against Lewis. The single question in the case arose upon the construction of the will of John Lewis, deceased, which was executed in 1805, and admitted to probate in 1816, the year of the testator’s death. The clause of the will in question is as follows:

“I give and devise the tract of land on which I now live,

Statement.

lying in Pittsylvania county, and on the north side of Dan river, containing about 1,300 acres, be the same more or less, to my brother, Charles Lewis, for and during his life, and after his death to his son, Nicholas Merewether, for and during his life, and after his death to his sons and their heirs forever, equally to be divided among them. But if Nicholas Merewether should die without leaving a son or son's son who can take the estate, and my brother Charles should have a second son, then at the death of Nicholas Merewether I give the said tract of land to the second son of my brother Charles, for and during his life, and after his death to his sons and their heirs forever, equally to be divided among them. But if my brother Charles should have more than two sons, and the two first should die leaving no son nor son's son living who can take the estate, then I give the said tract of land to the third son of my brother Charles, and after his death to his sons and their heirs forever, equally to be divided among them; and so on to every other son that he may have for life, with like remainders after their deaths to their sons forever, equally to be divided among them. But if my brother Charles should die leaving no son nor son's son capable of taking the estate, then in that event I give the said tract of land to the three sons of my deceased brother Robert for and during their lives, equally to be divided among them, to wit: John Goin, Robert Henry, and Merewether Warner, the part of each son at his death to go to his sons, equally to be divided among them and their heirs forever. If one or two of the said sons of my brother Robert should die leaving no son nor son's son capable of taking his part of the said land, then the part or parts of those that die without leaving sons or son's sons capable of taking, shall go to the surviving brother or brothers, and after his or their deaths to his or their sons, equally to be divided among them and their heirs forever. But if all three of my brother Robert's sons should die without leaving a son or son's son capable of taking the said land, then I give the said tract of land to the

sons living at the time of my sister, Jane Read, equally to be divided among them and their heirs forever.”

Charles Lewis survived the testator, and afterwards died, having had no other son than Nicholas Merewether. The latter died in 1889, unmarried and without issue. Robert Lewis' eldest son, Robert Henry, died in the year 1825, leaving a son, Fielding, who died in 1875, leaving two children, Frank and Annie. The second son of Robert, John Goin, died in 1881, unmarried and without issue; and the third son, Merewether Warner, died in 1846, leaving a son, John W., and a daughter.

The circuit court held that at the death of Nicholas Merewether the contingent remainder to the descendants of Robert took effect, and accordingly decreed that at the death of John Going, the second son, his interest passed, under the will, to his only surviving brother, Merewether Warner, whose son, John W., took, at the death of Nicholas Merewether, two-thirds of the estate, and that the other third passed to the children of Fielding. From this decree an appeal was allowed by one of the judges of this court.

Green & Miller, E. B. Withers, and F. W. Christian, for appellants.

E. E. Bouldin and Berkeley & Harrison, for appellees.

LEWIS, P. (after stating the case as aforesaid), delivered the opinion of the court.

It is clear, and we do not understand it to be seriously controverted, that Charles Lewis took under the will only a life estate. It is contended, however, in opposition to the decree, that Nicholas Merewether, by operation of the rule in *Shelly's Case*, took a fee tail, converted by the statute into a fee simple. That rule, now abolished in Virginia, is that where an estate of freehold is limited to a person, and the same instrument

Opinion.

contains a limitation, either mediate or immediate, to his heirs or the heirs of his body, the word heirs is a word of limitation; so that, if the limitation be to the heirs of his body, he takes a fee tail; if to his heirs general, a fee simple. But clearly, it was not the intention of the testator to give to Nicholas Mereweather anything more than a life estate, and the intention in such a case must govern in the interpretation of the will, unless language is used which brings the case within some inflexible rule of law, as in *Moore v. Brooks*, 12 Gratt., 135, and *Hall v. Smith*, 25 *Id.*, 70, in both of which cases words appropriate to create a fee tail were superadded to the gift of a life estate; in the first case the devise being to M. and B. for and during their natural lives, and then to "their heirs lawfully begotten"; and in the second to M. for life, and then to "the lawful issue of her body," &c. The rule in *Shelly's Case* was, therefore, held to apply, on the principle, stated by Lord Redesdale in *Jesson v. Wright*, 2 Bligh, 1, viz: that "technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise."

But here no such technical words are used. The devise is to Nicholas Mereweather "for and during his life, and after his death to his sons and their heirs forever, equally to be divided among them." Now, here not only is a life estate given expressly, but the subsequent language is not such as of itself to create a fee tail; for while a testator may use the word son as a word of limitation, it is, in its technical sense, a word of purchase, and was presumably so used in the present case, there being nothing in the context to show the contrary. 3 Lom. Dig., 302; *Moon v. Stone*, 19 Gratt., 130, 242.

It was forcibly remarked by Judge Lyons, in *Smith v. Chapman*, 1 H. & M., 240, 302, that since the act of 1776 abolishing entails, he would not suppose a man intended to convey an estate tail unless plain and unequivocal words were used, such as would of themselves create a fee tail without resorting to

Opinion.

implication; as a devise "to A. and the heirs of his body," or "to A., and if he die without issue," &c.; and he added that to fulfil the plain and manifest intention of the donor the limitation must be equally plain and express; not an implied limitation by mere construction to enlarge an express estate for life into an estate in fee or fee tail. See, also, 2 Min. Insts. (4th ed.), 465; *Taylor v. Cleary*, 29 Gratt., 448.

Inasmuch, therefore, as Nicholas Merewether, who was an only son, died without having had a son, the circuit court rightly held that at his death the remainder over to Robert Lewis' descendants took effect. It is contended, however, that the latter devise is void, because the preceding limitations over were void for remoteness. But its validity is not dependent upon the validity of those limitations, and we need not, therefore, stop to inquire as to their validity. The devise to Robert's sons, etc., was intended as a substitute to take effect in the event of the failure of the former limitations over to take effect, and as such is valid, it being limited to vest in interest within a life or lives in being and twenty-one years and ten months thereafter.

It is a well established rule of the common law that while no remainder can be limited after a limitation in fee, yet two contingent fees, by way of remainder, may be limited as substitutes or alternatives, one for the other, the latter to take effect in case the prior one should fail to vest in interest, and is immediately avoided if the first does vest in interest. 1 Lom. Dig., 417; 2 Min. Insts. (4th ed.), 395; *Cooper v. Hepburn*, 15 Gratt., 551, 559. And Redfield, in his work on Wills, in treating of perpetuities, lays it down, on the authority of numerous adjudged cases, that "alternative limitations may be so framed as to be good or bad according to the event; and if the contingency which is valid occur, the estate will be held legal, notwithstanding the other alternative be too remote." 2 Redf. Wills, 573.

The will further provides that "if one or two of the said

Opinion.

sons of my brother Robert should die, leaving no son nor son's son capable of taking his part of the said land, then the part or parts of those that die without leaving sons or son's sons capable of taking shall go to the surviving brother or brothers, and after his or their deaths to his or their sons, equally to be divided among them and their heirs forever."

Whilst this language is not very plain, we are of opinion that the construction put upon it by the circuit court is the correct one. Therefore at the death of John Goin, his "part" went to his only surviving brother, Merewether Warner, for life, and at his death to his "sons, equally to be divided among them." Merewether Warner, however, died, having had only one son, who survived him and Nicholas Merewether, also, and who, as the circuit court decreed, is entitled to two-thirds of the land, the remaining third going to the children of Fielding Lewis, deceased, the only son of Robert Lewis' eldest son, Robert Henry, who died in 1825.

DECREE AFFIRMED.

Richmond.

DANIEL'S EX'OR v. WHARTON.

MARCH 15th, 1894.

1. **PRINCIPAL AND SURETY—Release.**—Compromise between principal and obligee in bond signed by former and another, made in consideration of former's surrendering real estate to be immediately applied to the bond and in full discharge thereof: *held*, operates as a release of the other signer whether joint obligor or mere surety, whether such compromise be regarded as an absolute release, or as extending time of payment, or as taking new security.
2. **INTEREST—Funds in custodia legis.**—Where the funds have remained in the court's hands during the litigation, interest, *held* not allowable except from date of judgment.

Appeal from decree of circuit court of Fauquier county, rendered January 11, 1890, in the creditor's suit, wherein Robert A. Banks for, &c., was complainant, and J. J. Halsey and William J. Wharton, surviving executors of William Wharton, deceased, and others were defendants. By the decree Commissioner G. D. Gray was required and ordered to pay to J. S. Wharton, trustee, or his attorneys, the sum of \$500, reported by said commissioner to be in his hands, in his report of November 4, 1882, and T. S. Alcocke, executor of S. A. Daniel, deceased, to pay *de bonis testatoris* to said Wharton, trustee, or his attorneys, the costs of this suit accruing since November 4, 1882. Among the debts reported by the commissioner against the estate of William Wharton, deceased, was one in favor of the estate of S. A. Daniel, deceased, amounting to \$537, as of the date of the decree. Exceptions

Statement—Opinion.

to said debt being sustained by the decree, his executor appealed. Opinion states the case.

G. D. Gray and J. G. Field, for appellant.

Rixey & Barbour, James Pollard, and J. C. Gibson, for appellee.

HINTON, J., delivered the opinion of the court.

The bill in this cause was filed in the year 1872, against the executors and devisees of William Wharton, who died in 1858.

Thus it appears that the usual accounts were directed some fourteen years after the death of the said William Wharton. In August, 1875, there was reported the debt which is the cause of the present controversy, it appearing for the first time in the third account which had been taken.

The evidence of the debt is a bond for \$200, executed in December, 1850, to William S. Daniel by M. Wharton and William Wharton.

This bond appears on its face to be the joint bond of the parties, but is shown, we think, very clearly to have been the bond of Malcolm Wharton, principal, with William Wharton, as his security. The commissioner reports no personal assets in the hands of the executor of William Wharton since 1864, but no account of the transactions of the executors to show what had been done with the personal property, but it seems probable that it was distributed to his legatees, while, as the counsel for the appellees say, "the creditors slept upon their rights." In October, 1878, commissioners were appointed to make sale of the real estate of the said William Wharton and it was accordingly sold, and the sum of \$500 has been in the hands of the commissioner since November 4th, 1882.

In June, 1881, John S. Wharton, his wife, and infant children, as devisees of William Wharton, filed their petition for

Opinion.

review, demurrer, and answer, pointing out the irregularities in the proceedings, suggesting the want of proper parties, and excepting to this claim of Daniel's executor on the ground that the creditor was acting in bad faith, and in contravention of certain articles of agreement and compromise entered into between M. H. Wharton and one M. J. Wharton and their creditors, during the months of March and April, 1868. These agreements were filed as a part of the petition, and special exceptions to the claim of Daniel's executor were noted in the petition.

Under the facts of this case the decree of the lower court seems eminently proper.

By these articles of compromise the creditors of M. J. Wharton, this is, the said Malcolm Wharton, and W. J. Wharton, agree in consideration of the surrender of certain real estate of the debtors for immediate application to their debts to receive such dividend as the property will realize, to be, &c., in full discharge and satisfaction of their debts. And under these articles the real estate of M. H. Wharton and W. J. Wharton was turned over to Joseph J. Halsey, the trustee of the creditors, who continued in possession, collecting rents, and sold a part of it; and this state of things continued from the spring of 1868 until the fall of 1874.

Now that Daniel's executor had the right to unite in the contract of compromise and settlement can scarcely be doubted, and that he did sign the same is admitted. *Boyd v. Oglesby*, 23 Gratt., 674. And the effect of this action of the creditor with regard to principal debtor, whether it be regarded as an absolute release of the debt, or as extending the time for the payment thereof, or as the taking of other security, was under the authorities to release William Wharton whether he was a joint principal or a mere surety. Baylies on Surety, sec. 5, p. 119; *Id.*, sec. 20, p. 274; Brandt on Suretyship, sec. 122, p. 173; *Kirby v. Taylor*, 6 Johns. Chy., 242; Bishop on Contracts, secs. 869, 870; *Rowley v. Stoddard*, 7 Johns., 207; *Garnett's Ex'ors v. Macon*, 6 Call., 343.

Opinion.

On the question of interest we feel more doubt, but under the circumstances of the case, as the claim has been in constant litigation and the fund has been in *custodia legis*, we think it better to allow only from the date of the decree.

On the whole, we perceive no error in the decree complained of, and it is affirmed.

DECREE AFFIRMED.

Richmond.

WHITELAW'S EX'OR v. SIMS.

MARCH 15th, 1894.

1. **WILLS—Undue influence.**—The fact that the will of a person 88 years old differs from her previously expressed intention, and is made in favor of those standing in a relation of confidence and dependence toward her, raises a presumption of fraud and undue influence, which must be overcome by satisfactory testimony in order that the will may stand. *Hartman v. Strickler*, 82 Va., 238.
2. **IDEM—Incapacity—Duress.**—Opinions of witnesses long acquainted with testatrix, as to her mental incapacity and incompetency on account of bodily infirmity and duress, *held*, admissible as evidence in a suit to set aside the will, though they be not subscribing witnesses. *Young v. Barner*, 27 Gratt., 103.

Appeal from decree of circuit court of Orange county, rendered July 18th, 1889, wherein Mary Whitelaw's executor and heirs were complainants, and ——— Sims and others were defendants. The object of the suit was to annul her will. The verdict of the jury being in favor of the will, the complainants moved to set it aside and to be allowed a new trial of the issue of *devastavit vel non*; but the court denied the motion and rendered its decree accordingly and the complainants appealed. Opinion states the case.

A. R. Blakey and *G. D. Gray*, for appellants.

J. G. Field and *John G. Williams*, for appellees.

LACY, J., delivered the opinion of the court.

Opinion.

The bill was filed in this case by the appellants against the appellees, to set aside the will of Mrs. Mary Whitelaw, who died in December, 1874, upon the ground of undue influence and the incapacity of the said testatrix on account of imbecility of mind and bodily infirmity, caused by the extreme old age of the testatrix. The defendants answered, denying the allegations of the bill. A jury was impanelled to try the issue as to the validity of the will, and the case was submitted to the jury upon the evidence in the form of depositions and the testimony of witnesses, together with the instructions of the court. There was much conflict in the testimony submitted to them, upon consideration of which the jury rendered a verdict in favor of the will, which verdict the contestants moved the court to set aside and grant a new trial, which motion the court overruled, and the contestants excepted, and there were sundry bills of exception filed to the rulings of the court during the trial. Upon the rendering of the decree by the court in accordance with the verdict, and refusing to set aside the verdict, the appellants applied for and obtained an appeal to this court.

Upon the motion to set aside the verdict as contrary to the evidence, the same having been approved by the trial court, the same could not be disturbed by this court unless without evidence or palpably wrong. But by the bills of exception filed in the cause it appears that the trial court excluded the opinion of witnesses for the contestants, showing the mental incapacity of the testatrix, and her incompetency on account of bodily infirmity and duress (these witnesses were long acquaintances, some of whom had lived in the house with her), and admitted the testimony of other witnesses, not subscribing witnesses, as to the good condition of her mind and her capacity, against the exception of the contestants, and refused to instruct the jury that when a will executed by an old person (in this case the testatrix was eighty-eight years old) differs from his or her previously expressed intention, and is made in favor of those who stand in relation of confidence or depend-

Opinion.

ence towards him or her, it raises a violent presumption of fraud and undue influence, which should be overcome by satisfactory testimony, and that it is not essential to the application of the principle that unsoundness of mind on the part of the testator should be shown; the question is not whether the testator knew what he was doing, but how the intention was produced; and, if it appears that it arose from the controlling influence of force, imposition, or fraud, that is sufficient for setting aside the will—and gave another leaving out the presumption of fraud and undue influence, which should be overcome by satisfactory testimony.

In the case of *Hurtman v. Strickler*, 82 Va., 238, citing 1 Williams, Ex'rs, 58, note, it is said: "When a will executed by an old man differs from his previously expressed intentions, and is made in favor of those who stand in relations of confidence or dependence towards him, it raises a violent presumption of fraud and undue influence, which should be overcome by satisfactory testimony." See the opinion of this court in that case and authorities cited. This instruction correctly expounding the law according to the decisions of this court, was refused, and the refusal of the court to give it, at least in substance, is error, for which the decree will be reversed here. 1 Jarm. Wills, 71, 72. The court also erred in excluding the opinions of witnesses having peculiar advantages of knowing as to the capacity of the testatrix. This was the very question at issue. *Insurance Co. v. Rodel*, 95 U. S., 238; *Young v. Barner*, 27 Gratt., 103; 1 Jarm. Wills, 115, 130. Whatever was the weight to be attached to this class of testimony, it was competent, and should not have been withdrawn by the court from the consideration of the jury. See the opinion of Mr. Justice Bradley in *Insurance Co. v. Rodel*, *supra*. The verdict of the jury having been rendered on a partial and incomplete portion of the legal evidence, and upon erroneous instructions given by the court, the same should have been set aside, and a new trial awarded; and the decree of the circuit court refusing the

Opinion.

motion to that end is erroneous, and must be reversed and annulled, and the case remanded for a new trial to be had therein.

DECREE REVERSED.

Richmond.

MORTON v. DILLON.

MARCH 15th, 1894.

SURETY—Creditor—Collateral—Subrogation.—A surety having paid the creditor a part of the debt, may recover from him the amount paid, where the creditor has, upon receiving from principal debtor the balance of the debt, surrendered to him without the knowledge or consent of the surety, the collateral security deposited with the creditor by the principal debtor.

Appeal from decree of circuit court of Prince Edward county, rendered September 1st, 1891, in a chancery cause wherein the appellee, James M. Dillon, was complainant, and William Morton, Wm. T. Cunningham, Samuel N. Cunningham, and T. Henry Glenn were defendants. The decree being adverse to the defendant, Wm. Morton, he appealed. Opinion states the case.

W. W. Henry, for appellant.

Leake & Carter and *J. P. Fitzgerald*, for appellees.

LACY, J., delivered the opinion of the court.

The case, as disclosed by the record, is as follows: The bill was filed in December, 1887, by the appellee, against the appellant, William Morton, and the other defendants, alleging that on July 10, 1884, William T. Cunningham and the appellee, James M. Dillon, executed a bond to the appellant, Wil-

Opinion.

liam Morton, payable January 10, 1886, the consideration of which was money lent William T. Cunningham by said Morton, amounting to \$700, which was the sum for which the bond was given, and the said Dillon was the surety on the said bond. That the said Dillon became the surety on the said bond only on the condition that William T. Cunningham should give him counter security by giving to said Dillon the bond of Samuel N. Cunningham, payable to William T. Cunningham, with T. Henry Glenn as surety thereon, in the sum of \$500, but that, in violation of his promise, the said William T. assigned this bond to Morton, taking from him an agreement that this bond was to be held by the said Morton as collateral security only for the payment of the bond of \$700 mentioned above, and, when the said bond was fully paid, then the said collateral was to be returned. On September 7, 1886, W. T. Cunningham and said Dillon had confessed judgment on the said \$700 bond in favor of Morton; on October 15, 1886, Dillon paid \$200 on the said judgment; and on October 18, 1886, Morton sued out an execution on the said judgment, which was levied on Dillon's property, whereupon he gave a forthcoming bond in the penalty of \$1,543 02; and shortly after there was a judgment rendered on this forthcoming bond, when Dillon paid \$540 on the same, leaving \$35 36 costs. And Dillon notified Morton that he claimed the said \$500 bond as his property, so far as necessary to indemnify him for the money he had paid as surety for W. T. Cunningham's bond, requested Morton to deliver to him (Dillon) this bond, and offered to indemnify Morton against W. T. Cunningham; but Morton refused to deliver the bond to Dillon, upon his indemnity, unless he (Dillon) should obtain Morton's receipt from W. T. Cunningham, or cause it to be delivered up by W. T. Cunningham.

In September, 1887, it was arranged between Morton and Dillon that the latter should raise and pay or deposit the \$35 36 still due on said judgment, and then enjoin Morton from delivering up the said bond. But when, in October, 1887,

Opinion.

Dillon approached Morton with the \$35 36 to pay off the judgment, he was met with the information that Morton had collected \$35 36 from W. T. Cunningham, and delivered up the said collateral: that W. T. Cunningham was insolvent; that William T. Cunningham was therefore indebted to Dillon for the money paid as his surety, and that Dillon was entitled to be subrogated to all the rights and remedies which Morton held against W. T. Cunningham, and to the said collateral deposited with Morton as aforesaid, and that said Morton, having delivered up this collateral, was bound to Dillon for what could have been realized on it. That said Cunningham and said Glenn, having full notice of the premises, were still bound to Dillon on this bond on which they had paid the said small amount; that the dealings by the said parties with the said bond were in fraud of the rights of Dillon, and void—and prayed that William T. Cunningham be enjoined from disposing of this part, if undisposed of, and Samuel N. Cunningham and T. Henry Glenn be enjoined from paying anything on this bond to William T. Cunningham; that, if the said Samuel N. Cunningham and T. H. Glenn have acquired possession of this bond, they be required to file it, with their answer, and Morton be required to file the receipt which he took back from William T. Cunningham, and the said bond of \$500, not yet being due and payable; that the same shall be collected when due and the proceeds paid to Dillon, or, if the said bond, by reason of the acts of said Morton, could not now be collected, then that there be a decree against Morton for the amount of the same, and for general relief, etc. The injunction prayed for was awarded, in accordance with the prayer of the said bill. The bill was demurred to, and the same was overruled; and the answer of Morton was filed, detailing the transactions as aforesaid, and setting up the delay of Dillon in getting an injunction, as suggested, and claiming to have acted conscientiously, and imputing *laches* to Dillon, etc. The facts appearing to be as stated by depositions in the cause, upon de-

Opinion.

cree the circuit court overruled the demurrer of Morton, took the bill for confessed as to the two Cunninghams and Glenn, and decreed that Morton should pay the amount of the collateral bond—delivered up by him, under the stated circumstances, to Cunningham—to Dillon, the surety aforesaid; whereupon Morton appealed to this court.

The error assigned here is to the action of the court in decreeing against Morton the amount of the collateral, instead of decreeing against the Cunninghams and T. Henry Glenn the collection of the bond. There can be no doubt that the surety was entitled to be subrogated to the rights of the creditor as further security for the debt on which the surety is bound, so far as he has paid the debt as surety, and the creditor is bound to hold the collateral so deposited with him for the benefit of the surety, as well as for his own; and he must account to the surety for the value of the property, not only if he parts with it, or surrenders it, without the consent of the surety, or does any affirmative act in violation of the trust upon which he holds it, but also for any negligence or omission to perform any act, whereby the surety's recourse to the fund is prejudiced. *Sheld. Subr.*, § 120, and cases cited; *Id.*, 129, §§ 119, 123. A surety, upon paying the debt, is subrogated to the rights of the creditor in any collateral security which the creditor holds for the payment of the debt. It follows that, if a creditor holding collateral security surrenders it to the principal debtor without the knowledge or consent of the surety on the debt, he thereby discharges him, to the extent of the value of the property surrendered. *Jones, Pledges*, §§ 518, 515; opinion of Mr. Justice Matthews in *Hampton v. Phipps*, 2 Sup. Ct., 612, 624. A surety may recover the value of the collateral, when he has discharged the debt in ignorance of the surrender of the collateral to which he was entitled. *Jones, Pledges*, § 517. If the principal debtor has himself paid part of the debt and the surety the residue, when once the creditor is fully satisfied, the same principle of equity

which substitutes the surety who has paid the whole debt to the place of the creditor will equally extend and apply to the surety paying a part thereof, to the extent of his payment. *Id.*, § 128, and cases cited. A partial payment is sufficient to establish the surety's right against the principal debtor. It is only the creditor who can insist that the debt shall be paid in full. *Gedye v. Matson*, 25 Beav., 310. And when the debt has been fully paid the right of the surety is established to the extent of the payment made by him. The decree of the circuit court appealed from, having been rendered in accordance with the above well-settled principles, is right, and must be affirmed.

DECREE AFFIRMED.

Richmond.

COMMONWEALTH v. McCULLOUGH.

SAME v. DAVIS AND AL.

SAME v. BARRY.

SAME v. McCULLOUGH AND AL.

MARCH 15th, 1894.

1. APPELLATE COURT—*Jurisdiction—Coupons*.—This court hath jurisdiction on appeal, of an action necessarily involving the validity of coupons cut from bonds issued under Acts March 30, 1871, and March 28, 1879, relating to the funding and payment of the public debt, and offered in payment of taxes, although less than the jurisdictional minimum is involved, as the validity of those acts is brought in question.
2. CONSTITUTION—*Coupons—Taxes—Schools*.—The coupons attached to the bonds issued under Acts March 30, 1871, and March 28, 1879, and expressed on their face to be receivable at and after maturity for *all* taxes, debts, dues, and demands due the State, evince an entire contract, incapable of separation; and such contract, being in violation of the constitutional provision in regard to setting apart the literary fund of the State for public school purposes in so far as it makes the school taxes payable in such coupons, (as decided by the U. S. Supreme Court in *Vashon v. Greenhow*, 135, U. S., 716), held wholly unconstitutional and void.

Error to four judgments of circuit court of city of Norfolk, rendered June 29th, 1892, in the cases of Commonwealth against A. A. McCullough, Same against James E. Barry, Same against M. L. T. Davis & Co., and Same against A. A. McCullough & Co.,

Statement—Opinion.

all of which cases are precisely alike, the same questions being involved in each of them. The judgments being adverse to the commonwealth, it brought them here upon writs of error. Opinion states the case.

Attorney-General R. Taylor Scott, Ellis & Kerr, and H. R. Pollard, for commonwealth.

Maury & Maury, for defendants in error.

RICHARDSON, J., delivered the opinion of the court.

These cases, like the *Virginia Coupon Cases*, decided in April, 1885, and reported in 114 U. S., 269, and like *Barry v. Edmunds* and other cases argued at the same time, decided in February, 1886, and reported in 116th U. S., 550, and also like the group of eight cases, including *McGalvey v. Virginia*, *Hucless v. Virginia*, and *Vashon v. Greenhow*, decided by the Supreme Court of the United States at the October term, 1889, and reported in 135 U. S., 664, etc., arise with respect to certain coupons alleged to have been cut from bonds of the commonwealth of Virginia, issued under an act of her general assembly, approved March 30, 1871, and entitled "An act to provide for the funding and payment of the public debt," or from bonds of said commonwealth issued under authority of an act of her general assembly, approved March 28, 1879, entitled "An act to provide a plan of settlement of the public debt," it being further alleged that said coupons "are by law receivable for taxes, debts, and demands due the State of Virginia."

The defendant in error, A. A. McCullough, who was the petitioner in the court below, on the 20th day of May, 1892, presented his petition in the circuit court of the city of Norfolk as follows:

Your petitioner, A. A. McCullough, respectfully represents unto your Honor that he is a tax-payer of the city of Norfolk,

Opinion.

That on the 30th day of April, 1892, being indebted to the State of Virginia \$498, State tax, due by him on his real estate, other than school tax, and not liquor license tax, he tendered W. W. Hunter, treasurer of said city, and the officer appointed by law to receive said tax, in payment thereof \$498 in past due coupons (as per schedule herewith), cut from bonds of the said commonwealth, issued under an act of the general assembly, approved March 30, 1871, and entitled "An act to provide for the funding and payment of the public debt," or from bonds of the said State issued under authority of an act of her general assembly, approved March 28, 1879, entitled "An act to provide a plan of settlement of the public debt," which said coupons are by law receivable for taxes, debts, and demands due the State of Virginia, who received the same for identification and verification and forwarded them to this court for that purpose, according to law (see his receipt therefor herewith filed, marked exhibit "B," and prayed to be taken as part of this petition). And thereupon your petitioner paid him the full amount of said tax in money. Your petitioner alleges that no part of the tax for which said coupons were tendered was set apart for or appertained to public school purposes, or the literary fund.

Your petitioner alleges that the said coupons are genuine legal coupons, past due, and legally receivable for all taxes, debts, and demands due the commonwealth of Virginia; and your petitioner prays that the State of Virginia be summoned to answer this petition, and that when said coupons are ascertained to be genuine, legal coupons, past due, and receivable for taxes, debts, and demands due the commonwealth of Virginia, this court will so certify, to the end that your petitioner may recover back the money so paid by him as aforesaid, according to law, and your petitioner will ever pray.

[Signed]

A. A. McCULLOUGH,
By J. W. Willcox, his Attorney.

Opinion.

The case came on to be heard on the 29th of June, 1892, when the defendant, the commonwealth of Virginia, moved to dismiss the petition on the grounds that the acts approved March 30, 1871, and March 28, 1879, upon which those proceedings were based, are unconstitutional and void to the extent that the coupons attached to the bonds issued under each of these acts were thereby made "receivable for *all* taxes, debts, dues, and demands due the State." But the court overruled the motion, and the defendant excepted. Thereupon the defendant demurred to said petition; but the court overruled the demurrer. And then the defendant tendered five several pleas in writing, each of which was rejected; and to the action of the court overruling said demurrer and rejecting said pleas in writing, the commonwealth took her several exceptions.

The principal ground of demurrer, and the only one that need be mentioned here is this: That the acts in the petition mentioned are in conflict with the 7th and 8th sections of Article VIII of the Constitution of Virginia, and with sections 2 and 113 of the act of the General Assembly of Virginia passed in pursuance thereof, and approved March 15, 1884, to the extent that said acts of March 30, 1871, and of March 28, 1879, provide that the coupons therein mentioned shall be receivable after maturity for "*all* taxes, debts, dues and demands due the State, which shall be so expressed on their face."

It appears from the record that a jury was empannelled and sworn to try the issue, and responded by their verdict as follows: "We, the jury, find for the petitioner upon the issue joined, and we also find that the coupons mentioned in the petition are genuine, legal coupons, legally receivable for the taxes, debts, and demands due to the commonwealth of Virginia, for which they were tendered." And thereupon the circuit court adjudged and determined that "the said coupons are fully proved as genuine, legal coupons, legally receivable for the taxes, debts, and demands due the commonwealth, for which they were tendered."

Opinion.

At the instance of the defendant, the commonwealth of Virginia, the case is here on a writ of error to said judgment.

The first question for consideration arises upon the motion of the defendant in error to dismiss the writ of error awarded the commonwealth on the grounds, first, that the minimum jurisdictional amount is not involved; and, second, that the constitutionality of no law is involved. This question of jurisdiction, which confronts us at the threshold, presents no serious difficulty, and is easily disposed of. One of the questions involved in the issue tried, was whether the coupons tendered, were *legally* receivable for *all* taxes, debts, dues, and demands due the commonwealth of Virginia. There could be no other issue, because the said acts of March 30, 1871, and of March 28, 1879, respectively, provides expressly that the coupons attached to the bonds issued thereunder shall "be receivable at, and after maturity, for *all* taxes, debts, dues, and demands due the State;" and said acts expressly require that this be expressed on their face. Neither of said acts authorize coupons receivable, after maturity, merely for "taxes, debts, and demands due the State;" nor for taxes other than the fund dedicated by the constitution to the support and maintenance of the public free schools, and the liquor license tax. On the contrary, the language is, "for all taxes, debts, dues, and demands due the State, which shall be so expressed on their face." This quality of receivability presents the case of an entire contract that cannot be apportioned—a case where the bargain is one, the consideration is one, and the coupon covenant is one and inseparable; and, as the legal receivability of the coupons in question must depend upon the authority conferred by one or the other, or both, of the acts last above referred to, it would seem to follow, as a matter of course, that any coupon cut from bonds issued under either of said acts, that has not on its face the words "receivable, after maturity, for *all taxes, debts, dues, and demands due,*" &c., is not a legally receivable coupon; or, in other words, is a coupon issued without authority of law.

Opinion.

Yet, in the petition, it is alleged that the petitioner being indebted to the State of Virginia \$498, State tax, due by him on his real estate, *other than school tax, and not liquor license tax*, tendered to W. W. Hunter, treasurer of said city, and the officer appointed by law to receive said taxes in payment thereof, \$498 in past due coupons, * * * cut from bonds of the said commonwealth, issued under an act of the General Assembly, approved March 30, 1871, * * * *or from bonds of the said State issued under authority of an act of her General Assembly, approved March 28, 1879, &c.,* * * * which said coupons are, by law, receivable "for taxes, debts, and demands due the State of Virginia, who reserved the same," &c.

This form of declaring on or describing the legal receivability of the coupons was evidently intended as a means of avoiding the necessary effect of the decisions of the Supreme Court of the United States in *Hucless v. Childrey* and in *Vashon v. Greenhow*, 135 U. S., 709 and 713, decided in 1889, and hereinafter to be more particularly referred to. It is, however, obvious that the coupons thus described could not be genuine, legal coupons, receivable for *all taxes, debts, dues, and demands* due the State.

But, notwithstanding the above description, which makes the coupons anything else than genuine, legal coupons, the petitioner proceeds to allege, in his petition, "that said coupons are genuine, legal coupons, past due, and legally receivable for *all taxes, debts, and demands* due the commonwealth of Virginia." Obviously the two conflicting descriptions cannot stand together; and it is equally clear that neither is an accurate description of a genuine, legal coupon, legally receivable for "*all taxes, debts, dues, and demands*" due the State. Such the coupons must be, or else they are unauthorized by law, and are not genuine, legal coupons, but are spurious and illegal. Coupons receivable "for taxes, debts, and demands due the State, other than the school fund and the liquor license tax, is altogether a different thing, in substance as well as form, from

Opinion.

coupons receivable for *all* taxes, debts, dues, and demands," &c. The former is without authority of law, and, therefore, illegal and void; while the latter gives expression to the very form and substance of the coupon contract, expressly prescribed by the said acts of March 30, 1871, and of March 28, 1879. The statute of *Jeofails* has accomplished much in the way of amendments, and of dispensing with matters in pleading deemed immaterial; but that statute has never been carried to the absurd extent of allowing one contract to be set up in pleading, and allowing a recovery on a materially different contract.

Moreover, the prayer of the petition is, "that a jury be impannelled to try the question whether said coupons are genuine, legal coupons, legally receivable "for taxes, debts, and demands due the commonwealth of Virginia," &c. Thus again attempting to set up unauthorized, illegal coupons instead of genuine, legal coupons, receivable "for *all* taxes, debts, dues, and demands due the State." The coupons, if genuine, legal coupons, were, *ex vi termini*, receivable for *all* taxes, debts, dues, and demands, or they were receivable for none. The coupon feature of the contract is entire, and cannot be separated into parts, and it must be valid as a whole, or it is illegal and therefore invalid for any purpose.

The petitioner's informal, irregular, and illegal mode of procedure was evidently imparted to and influenced the mind of the jury; that is, if we may judge by their peculiar verdict. They say: "We, the jury, find for the petitioner upon the issue joined, and we also find that the coupons mentioned in the exhibit filed with the petition and presented to us by the court—to-wit: coupons for \$498—are genuine, legal coupons, past due, and receivable for the taxes, debts, and demands due the commonwealth of Virginia, for which they were tendered," &c. And the judgment of the court was "that the said coupons are fully proved as genuine, legal coupons, past due, and receivable for the taxes, debts, and

Opinion.

demands due the commonwealth of Virginia, *for which they were tendered,*" &c. It is too plain for argument that there are not in existence any genuine, legal coupons, such as are thus described, cut from bonds issued either under the act of March 30, 1871, or that of March 28, 1879. If, then, the jury, instead of being sworn to try the issue, as prescribed by the statute, whether the coupons tendered were genuine, legal coupons, "receivable after maturity for *all* taxes, debts, dues, and demands due," &c., were sworn to determine whether the said coupons were genuine, legal coupons, legally receivable merely "for taxes, debts, dues," &c., or were so receivable "for the taxes, debts, and demands for which they were tendered" (and it appears from the record that they were, in effect, so sworn), then the jury were sworn to try an issue responsive to the description of the coupons mentioned in the petition, but entirely variant from, outside of, and beyond the coupon contract, and an issue at variance with that directed by the statute.

These were the matters necessarily involved in the commonwealth's motion to dismiss, and especially in her demurrer to the petition. The validity of a statute of the State was thus directly and unmistakably brought in question. The petition alleged that the coupons tendered were genuine, legal coupons, legally receivable for the tax for which they were tendered; the verdict of the jury was to the same effect, and such was the judgment of the court. Hence, the validity of the coupon feature of the acts of March 30, 1871, and of March 28, 1879, was necessarily involved, and had not the court below thought so, it could never have pronounced the judgment it did. It is, therefore, manifest that this court has jurisdiction of the cases.

We come now to the main question in the case, and that is whether the coupon feature of the funding acts, on which the proceedings in this case were based, are in conflict with the constitution of Virginia. But before entering upon the discussion of this question, which is one of great importance

Opinion.

both to the State and her creditors, it is important to refer to the fact that the indebtedness of Virginia has at last been justly, equitably, and satisfactorily settled by the State and her creditors, by an adjustment known as the "Olcott settlement." However, a small minority of such creditors who hold bonds and coupons, past due and to become due, amounting to about \$2,300,000, obstinately hold out and refuse to accept the liberal terms of said settlement, and, with seeming remorseless vindictiveness, continue to harass the State by a perpetual clamor for the stipulated "pound of flesh"; and this they do regardless of the state of poverty and wretchedness to which the people of Virginia were reduced at the time of the passage of the original funding bill of March 30, 1871; regardless of the fact that the old State, miserably poor and dependent in other respects, emerged from the unfortunate civil war in which she had become so disastrously involved, and in which her people honestly and bravely contended for what they believed to be right, to find herself, without her consent, stripped by the hand of governmental power, exercised as a necessary war measure, of one-third of her territory, population, and taxable values, and, in addition thereto, the loss to the residue of the old State of a vast property, upon the faith of which her debt had been contracted; regardless of the fact that the old State was, during the entire period of the war, the tramping ground, the battle ground, and burying ground of vast contending armies; and regardless of the fact that the Virginia people—men, women, and children—were so utterly poor that they were most indifferently supplied with food, and were unable to supply themselves with comfortable, and in numberless cases, even with decent clothing, and too poor to supply themselves with teams and implements essential to the cultivation of their fields, and that her children were growing up in ignorance, without the means of education. In addition to all this, the old commonwealth was deprived of her proud position of statehood and was reduced

Opinion.

to that of a conquered province, known as District No. 1. However deeply humiliating all this may be, it is at last but a feeble picture of the real poverty and suffering to which our people were reduced. They only who are ignorant of the real state of facts can be excused for imputing dishonorable motives to the people of Virginia. There is another class of persons who, urged on by illiberal and selfish views, or prompted by the vain desire for much speaking and writing, have been willing to contribute the weight of their influence, real or imaginary, to the ignoble cause of defaming a brave and generous people. And by such people the public sentiment has been misled, and great wrong done to the State. But, notwithstanding all this, the true inwardness of this relentless war, by the coupon-holders against the State, was at last seen by the highest court of the land, as exemplified in its decisions in *Hucless v. Childrey* and *Vashon v. Greenhow*, *supra*, by which previous decisions of that court were greatly modified.

It is in the light of those two decisions that we now propose to consider the question as to the validity of the coupon feature of the original funding act of March 30, 1871. We do not assail that act as unconstitutional as an entirety. We simply hold that the coupon feature of the act, the coupon contract, which is readily separable from the rest of the act, is repugnant to sections 7 and 8 of article 8 of the constitution of Virginia, and is, therefore, an illegal contract. The validity of the bonds issued under and by authority of said acts of March 30, 1871, and March 28, 1879, is not denied; nor is it denied that the bondholders are entitled to the interest on the bonds to be collected in the ordinary way; but we do deny that it can be collected through the medium of the illegal coupon, which have been most aptly designated the "cut worm of the treasury."

In considering whether or not the coupon feature of the act of 1871, is repugnant to said provisions of the State constitution, we will not repeat at length the constitutional arguments

Opinion.

which have been so often urged heretofore, which have engaged the serious attention of many of the ablest legal minds, and which have been deliberately passed upon by the Supreme Court of the United States. It is important, however, to repeat so much of the argument, judicial and otherwise, as supports the conclusion arrived at by this court, and seems to be, upon principle and authority, in perfect accord with the decisions of the Supreme Court of the United States in the cases of *Hucless v. Childrey* and *Vashon v. Greenhow*, *supra*.

Coming, then, directly to the question, whether the coupon contract is repugnant to said provisions of the State constitution, and therefore illegal and absolutely void, it may, with the utmost propriety, be said that the unfortunate decision by this court in *Antoni v. Wright*, 22 Gratt., 813, has indeed proved to be the "Iliad of all our woes" touching the State's indebtedness; and but for it there never could have been any difficulty in the way of a just and equitable adjustment between the State and her creditors. If this court, instead of making the decision it did in that case, had promptly pronounced against the palpably illegal and, therefore, unconstitutional coupon feature of the act of March 30, 1871, the debt would have been promptly settled, and all this long and bitter controversy avoided. *Antoni v. Wright* was decided by a bare majority of a court of three judges, Moncure, P., not sitting, and Staples, J., dissenting and insisting that the said act of March 30, 1871, which provides that the coupons attached to the bonds issued thereunder shall, after maturity, be receivable "for all taxes, debts, dues, and demands due the State," is repugnant to the State constitution, notwithstanding the opinion of the bare majority, that that feature of the act was not repugnant to the constitution, and constituted an irrepealable contract on the part of the State with the holders of such coupons.

In the opinion of the majority of the court, it was admitted that "one legislature cannot by an act of ordinary legislation, bind or control in any manner subsequent legislatures," but it

Opinion.

was said that "by special legislation amounting to a contract, a subsequent legislature may be bound." In the light of this admission, taken in connection with the exception stated, it would seem to be sufficient to reply that the ingenuity of man cannot suggest anything more essentially and completely within the scope of ordinary legislation than is the legislative power to assess, collect, control, and disburse, through recognized agents, the State revenues.

But, in *Antoni v. Wright*, it was not denied, nor is it desirable, that a good and sufficient consideration is essential to the validity of a contract. And the dissenting opinion of Judge Staples denied with evident correctness that there was any consideration going to the State for the concession in the funding act touching the receivability of such coupons for *all* taxes, &c., as the creditor gave up nothing in return, and the State remained bound by its bonds for two-thirds and by its certificates for the remaining third of its original indebtedness; and, as is axiomatic, asserted that there can be no valid contract founded on a law which violates the constitution of a State.

And Judge Staples, in his very able dissenting opinion, insisted also that the contract in this case was void, because of its repugnancy to sections 7 and 8 of article 8 of the constitution of Virginia, by which certain portions of the State revenue are dedicated to the support of public free schools. In the opinion of the majority, Judge Bouldin, speaking for the court, declared, in effect, that the duties to pay the public debt and to support the public free schools are both obligatory under the constitution, and that both may be discharged, and that there was no conflict between the funding act and section 8 of Article 8 of the constitution. In whatever crudity this idea may have originated, it is certain that the Supreme Court of the United States has arrived at a very different conclusion, as is shown by its decision in *Vashon v. Greenhow*, *supra*.

At all events, the opinion of the court in *Antoni v. Wright*, is pregnant with a tacit admission that if such conflict did exist,

Opinion.

then the funding bill providing that such coupons should be receivable in payment of *all* taxes, debts, dues, and demands due the State would be unconstitutional, at least to the extent of such conflict. The authority of that decision has been recognized in several subsequent decisions of this court, as then constituted; and, in one of them, *Clark v. Tyler*, 30th Gratt., 134, decided in 1878, it was said that this decision (*Antoni v. Wright*) "must be held to be the settled law of this State." And in that case (*Clark v. Tyler*) this court even held that fines, and in *Williamson v. Massie*, 33 Gratt., 237, the capitation tax, both of which had been by the constitution dedicated to public free schools, might be paid in such coupons.

At this juncture the legislature passed an act which was approved March 15, 1884, and which was referred to in the answer of Greenhow, treasurer, in the case of *Vashon v. Greenhow*, *supra*, requiring taxes assessed for public free school purposes to be collected and kept separate from other taxes, and forbidding the receipt of anything other than current money for such taxes. This act was reviewed by this court in the case of *Greenhow, treasurer, v. Vashon*, 81st Va., 350, and was held constitutional and valid, notwithstanding the decisions in *Antoni v. Wright*, *Clark v. Tyler*, and *Williamson v. Massie*, *supra*, to the effect that such coupons were receivable in payment of *all* taxes, debts, dues, and demands due to the commonwealth. And the decision of this court in that case was affirmed on appeal by the Supreme Court of the United States. See *Vashon v. Greenhow*, 135 U. S., 716.

We cannot forbear to quote from Mr. Justice Bradley, who pronounced the opinion of the court in that case, as follows: "The other ground on which the Court of Appeals (of Virginia) placed its decision was that the act of 1871, as applied to the moneys due and payable to the 'literary fund,' or fund for the maintenance of the public free schools, was contrary to the constitution of the State, adopted in 1869. The 7th and 8th sections of the 8th article of the constitution declare as

Opinion.

follows: "Section 7. The general assembly shall set apart, as a permanent and perpetual literary fund the present literary fund of the State, the proceeds of all public lands donated by Congress for public school purposes, of all escheated property, of all waste and unappropriated lands, of all property accruing to the State by forfeitures and all fines collected for offences against the State, and such other sums as the general assembly may appropriate. Section 8. The general assembly shall apply the annual interest on the literary fund, the capitation tax provided for by this constitution for public free school purposes, and an annual tax upon the property of the State of not less than one mill and not more than five mills on the dollar for the equal benefit of all the people of this State." * * * The learned justice then proceeds as follows:

"The court, in its opinion, held that in view of these constitutional provisions, the legislature had no power to declare or to contract that the moneys due the literary fund might be paid in coupons attached to the bonds authorized by the act of 1871, and that such a payment would be repugnant to the very nature of the fund. It might well be added that coupons thus paid into the fund would be of no value whatever to it, for as soon as paid into the treasury they would become as valueless as if cancelled and destroyed, unless some provision was made for their reissue and the putting of them into renewed circulation. This would be opposed to the whole tenor of the act, would be unjust to the coupon-holders themselves, and would probably be contrary to the acts of Congress in reference to the creation of paper money. We think that the position of the Court of Appeals in this case is well taken; that coupons could not be made receivable as a portion of the literary fund, and that if they could not be received as part of the fund they could not be made receivable for the taxes laid for the purpose of maintaining said fund. * * * In our judgment the law requiring the school tax to be paid in lawful money of the United States was a valid law, notwithstanding the provisions

Opinion.

of the act of 1871; and that it was sustained by the sections of the constitution referred to, which antedate the law of 1871, and override any provisions therein which are repugnant thereto."

In *Hucless v. Childrey*, 135 U. S., p. 709, the Supreme Court of the United States held that sections 399, 536, and 538 of the Virginia Code of 1887, which forbid a treasurer to receive for a license tax for selling liquor by retail, coupons attached to bonds authorized by the act of 1871, were constitutional and valid.

And yet the Supreme Court of the United States, in *McGalvey v. Virginia*, 135 U. S., at page 668, declared in October, 1889, that that court had determined in *Hartman v. Greenhow*, 102 U. S., 672, decided in 1881, and in *Antoni v. Greenhow*, 107 U. S., decided in March, 1883, and in the *Virginia Coupon Cases*, 114 U. S., 269, decided in April, 1885, and in all the cases on the subject that had come before that court for adjudication, and that "it may be laid down as undoubted law, that the lawful owner of any such coupons has the right to tender the same, after maturity, in absolute payment of *all* taxes, debts, dues, and demands due from him to the State."

However it may appear, it is a fact of record that the same court did, at the same October term, 1889, in the cases of *Hucless v. Childrey* and of *Vashon v. Greenhow*, hold that the lawful owner of such coupons has not the right to tender the same, after maturity, in absolute payment of either the tax imposed on a license to retail liquor, or the taxes imposed for the maintenance of the public free schools, and that the acts of the general assembly prohibiting the receipt of such coupons and requiring current money of the United States in payment of such taxes, are constitutional and valid.

The manifest inconsistency of the last two decisions named with the former decisions of that court, can only be explained on the theory that for the reasons set forth in the opinions of the court in *Hucless v. Childrey*, and in *Vashon v. Greenhow*,

Opinion.

the court, upon deliberate and mature consideration, determined to so far retrace its steps as to effect a most material *modification* of its former views, and to hold, as it did, that, although the act of 1871 is broad enough in its phraseology—that is the coupon feature of the act—to embrace all taxes, &c., yet maturer consideration had induced the conclusion that that act could not be held to embrace *all taxes*, &c., without a palpable violation of the constitution of Virginia, and that said act was at least repugnant *in part* to the 8th section of article 8 of that constitution, and to that extent, at least, unconstitutional and void.

It must be borne in mind that it is not to the repugnancy of the act of 1871, to the later acts of the general assembly forbidding the receipt of such coupons in payment of certain taxes, &c., but to the repugnancy of the coupon feature of the act of 1871 to the 8th section of article 8 of the constitution, that the Supreme Court ascribes the invalidity of the coupon feature of the act, which, the court remarks, is antedated by the said constitutional provision. Hence such invalidity, or the vice which tainted the whole coupon contract, existed from the inception of that contract, and was not superinduced by the subsequent acts of the general assembly. Hence the Supreme Court purposely, though with evident reluctance, modified its previous rulings, deliberately intended to do so, as is made manifest from what is stated on page 684, 135 U. S., where, after reviewing every case that had come before that court involving questions growing out of the act of 1871, Mr. Justice Bradley said: “Without committing ourselves to all that has been said, or *even to all that has been adjudged*, in the preceding cases that have come before the court on the subject, we think,” &c. Mr. Justice Bradley, speaking apparently for the entire court, proceeds to render the opinion in the cases of *McGalvey v. Virginia* and seven other cases, the seventh being the case of *Hucless v. Childrey*, and the eighth being the case of *Vashon v. Greenhow*.

Opinion.

Now, we feel entirely safe in laying it down as an indisputable fact that it has been solemnly adjudged by the highest court in the land that the coupon feature of the act of 1871, so far as its validity was passed upon in *Hucless v. Childrey* and in *Vashon v. Greenhow*, was unconstitutional and void. The same is true of the act of 1879, because the same vice enters into and invalidates them both.

Such being an undeniable postulate, the next, and very material, question that arises is, what is the effect of the vice of illegality and consequent unconstitutionality as to part of an entire contract, whether by statute or otherwise; that is, as respects an entire contract, incapable of being apportioned? In other words, is it not a universally accepted principle of the law of contracts that an illegal element, or the vice of illegality entering into or constituting part of the promise, or consideration, of an *entire contract* renders the whole contract absolutely illegal and void? This question, upon principle and authority, can receive none other than an affirmative answer. No impartial mind can for a moment hesitate to pronounce the coupon contract an entirety and incapable of separation into parts, or of being construed as illegal and invalid as to part, and yet legal and valid as to the residue, for the simple legal reason that the bargain is one, the consideration is one, and the covenant is one, and the vice of illegality, in part, inhering in the coupon contract from its inception, the whole is void.

The coupon contract, as expressed on the face of each coupon, is that the coupons *shall* be receivable, after maturity, "for *all* taxes, debts, dues, and demands, due," &c.; and when any tax, of whatever character, is by judicial determination, or otherwise, exempted from the operation of the very terms of that contract, it can be for no other reason than that the contract is tainted with illegality, and is, therefore, wholly void; and such is necessarily the effect of the decisions of the Supreme Court in *Hucless v. Childrey* and in *Vashon v. Greenhow*, *supra*.

Opinion.

"The concurrent doctrine of the text books on the law of contracts is that if one of two considerations of a promise be void merely, the other will support the promise; but that if one of two considerations be UNLAWFUL the promise is void. When, however, for a legal consideration a party undertakes to do one or more acts, and some of them are unlawful, the contract is good for so much as is lawful, and void for the residue. Whenever the unlawful part of the contract can be separated from the rest it will be rejected, and the remainder established. But this cannot be done when one of two or more considerations is unlawful, whether the promise be to do one lawful act, or two or more acts, part of which are unlawful, because the WHOLE CONSIDERATION is the basis of the WHOLE PROMISE. The parts are inseparable." *Widoe v. Webb*, 20 Ohio St., 431, citing Metcalf on Contracts, 246; Addison on Contracts, 905; Chitty on Contracts, 730; 1 Parsons on Contracts, 456; 1 Parsons on Notes and Bills, 217; Story on Prom. Notes, § 190; Byles on Bills, 111; Chitty on Bills, 94.

And in the same case it is said: "Whilst a partial want or failure of consideration avoids a bill or note only *pro tanto*, *illegality in respect* to a part of the consideration avoids it *in toto*. The reason of this distinction is said to be founded, partly at least, on grounds of public policy, and partly on the technical notion that the security is entire and cannot be apportioned; and it has been said with much force that where parties have woven a web of fraud or wrong, it is no part of the duty of courts of justice to unravel the threads and separate the sound from the unsound," citing Story on Prom. Notes and Byles on Bills, *supra*, and then adds: "And, in general, it makes no difference as to the effect whether the illegality be at common law or by statute."

In *Noyes' Ex'x v. Humphreys*, 11 Gratt., 636, this court fully recognized and applied the same doctrine. In that case N. rented property from T., who undertook to have certain improvements erected thereon, and he contracted with H. to do

Opinion.

the work. H. proceeded to do part of the work and received some payments from T.; but finding that T. was embarrassed, he stopped the work, and declared that he would proceed no further with it. N. then told H. to go on and finish the work and he would pay him. H. then went on and finished the work, and after it was done settled with T. and took his bond for the balance due him. T. being unable to pay him, H. sued N. for the whole balance due him for the work. Held: "That the promise alleged in the declaration being an entire promise to pay as well for that done before as that done after the promise, even if the promise would have been valid as to the work to be done, it was collateral as to that which had been executed, and being an entire promise, it is void as to the whole."

In that case Allen, P., in delivering the opinion of the court, used the following pertinent language: "The debt had been incurred, and though there may have been a sufficient consideration of benefit to the landlord in avoiding the loss of rents and the injury resulting from leaving the work in an unfinished state to have supported a promise to pay for the liability of Thompson, the promise would have been collateral, though on a good consideration, and must be in writing to be valid. But where the verbal promise is entire, and part of it relates to a matter which renders it necessary under the statute that the promise should be in writing, the whole promise is void. Being entire and part of it void, the whole is defective."

In the light of the case last referred to, there can be no question as to the applicability of the same principle to the present case. Here the undertaking, expressed on the face of the coupon, was that it should be receivable, at and after maturity, "for *all* taxes, debts, dues, and demands due the State," but this court and the Supreme Court of the United States have solemnly declared, in *Vashon v. Greenhow*, *supra*, that "the legislature had no power to declare or contract that moneys due to the literary fund might be paid in coupons at-

Opinion.

tached to the bonds authorized by the act of 1871." It being, then, an undeniable fact that the coupon contract is an *entire* contract, it therefore follows, *ex necessitati*, that the whole promise is illegal and void.

In *DeBeerski v Paige*, 36 N. Y. R., 537, Davies, Ch. J., said: "It is well settled if part of an entire contract be void under the statute of frauds the whole is void; that the party shall not be permitted to separate the parts of an entire agreement and recover on one part, the other being void," citing *Chater v. Becket*, 7 Tenn., 197; *Crawford v. Murrall*, 8 John., 253. And in the same case it is said: "When a note is given in payment of an account, some of the items of which are legal and some illegal, although an action would lie for so much of the account as is made up of lawful items, the note itself is entirely void. That the plaintiff cannot recover on the note to the extent of the lawful items, although they are distinctly severable from the unlawful."

In *Thayer v. Rock*, 13 Wend., 53, a contract had been made as well for the sale of real as of personal property, which was entire, founded upon one and the same consideration, and the same not being reduced to writing, it was held that it was void, as well in respect to the personal as the real property. In that case Ch. J. Savage said: "The action in this case was brought to enforce that part of the contract which, if it had stood alone, would have been good, but being a part of an entire contract, embracing another subject, in respect to which it was void, the whole was void. The contract was to sell the mill site and privileges, and also the wood and timber, and was an entire contract, entered into for one and the same consideration; the two subjects cannot be separated, and being void in part is totally void.

So in the present case the contract was that the coupons should be receivable, at and after maturity, for *all* taxes, debts, dues, and demands due the State, which is an entire contract, but the petitioner below, the defendant in error here, seeks to

Opinion.

separate the good from the bad and to recover upon the averment that the coupons tendered by him were tendered in payment of taxes due by him, "other than school tax, and not liquor license tax." He cannot in this way be permitted to separate into parts an entire contract and recover on the parts supposed to be good, the others being void. In other words, he seeks to recover upon a contract which does not exist.

In *Craig v. State of Missouri*, 4 Peters, at page 436, Ch. J. Marshall, speaking for the Supreme Court, said: "The certificate for which this note was given being in truth 'bills of credit,' in the sense of the constitution, we are brought to the inquiry: Is the note valid of which they form the consideration? It has been long settled that a promise made in consideration of an act which is forbidden by law is void." It will not be questioned that an act forbidden by the constitution of the United States, which is the supreme law, is against law, so, in the present case, the promise, written on the face of the coupon, is forbidden by the constitution of Virginia, the supreme law of the State, and subordinate only to the federal constitution and laws made in pursuance thereof, and being tainted with illegality in part is void in toto.

In *Thompson v. Collins*, 4 Head (Tenn.), 441, the court said: "A containing on its face this or any other illegal stipulation cannot be enforced in a court of law or equity. No court will give its active aid upon such a contract."

In the case of *Filson's Trustee v. Himes*, 5 Pr. St., 452, Chief Justice Gibson concludes an able and instructive opinion in this language: "But in those cases distinct bargains were put in the same note; in this the bargain is one, the consideration is one, and the covenant is one, and all is void."

Cases holding the same doctrine might be multiplied almost without end; but it cannot be necessary to cite more cases in support of a principle universally accepted as the law in respect to entire contracts containing the vice of illegality in part.

Inasmuch, therefore, as the coupon feature of the funding

Opinion.

act of 1871, which is simply an incident to the main purpose of the act, and readily separable therefrom, and inasmuch as said coupon feature constituted a contract which is undeniably an entire contract and incapable of being separated into parts, and inasmuch as it has been declared by the highest court in the land that that contract is tainted in part with the vice of illegality, it necessarily follows that, in the light of the authorities cited above, the whole coupon contract, or covenant, is absolutely illegal and void. This, it seems to us, is clearly and necessarily the effect of the decisions of the Supreme Court of the United States in the cases of *Hucless v. Childrey* and *Vashon v. Greenhow*, *supra*.

The legislature undertook to make the coupons receivable for all taxes, &c. But the Supreme Court, in *Vashon v. Greenhow*, says this legislature had no power to do this. Why not? Simply because it was directly opposed to the aforesaid provisions of the State constitution with respect to the maintenance and support of the public free schools, and was, therefore, illegal and void. It cannot be pretended for a moment that the sacredness of the school fund depended upon the legislative act setting it apart, as required by the State constitution. The Supreme Court did not so decide, but, going back to the inception of the coupon contract, the illegal act of the legislature, declared that the legislature was without power and authority to do the act in question.

It should be remembered that it was the first legislature of Virginia after her restoration to statehood that passed the funding act of 1871. It was the bounden duty of that body to set apart and protect the school fund which had been solemnly dedicated by the constitution for the benefit of all the people of the commonwealth; but instead of performing the duty thus imposed, that body neglected to do so, and undertook to pledge that fund, with all other taxes, to the payment of coupons. No act more flagrantly illegal was ever perpetrated by any legislative body. The result points to the motive. It is

Opinion.

as well understood as any historical fact of the times, though not as readily susceptible of complete proof, that the funding act of 1871 was a huge fraud palmed upon the State in her poverty and distress. We are fully sensible of the fact that these things ordinarily should find no place in judicial opinions, but, as a part of the history of this long vexed subject, they may serve somewhat the purpose of vindicating the old commonwealth from the many aspersions attempted to be cast upon her good name. The people of Virginia have only sought protection from what they feel to be a great fraud and oppression. Had the State done less she would have rendered herself unworthy of her past history.

In concluding his opinion in *Vashon v. Greenhow*, Mr. Justice Bradley remarked: "It is certainly to be wished that some arrangement may be adopted which will be satisfactory to all the parties concerned, and relieve the courts as well as the commonwealth of Virginia, whose name and history recall so many interesting associations, from all further exhibitions of a controversy that has become a vexation and a regret." This remark is worthy alike of the man and the judge. The generous wish has been accomplished, except as to the little squad of coupon holders who continue to vex the commonwealth; and, whatever may be said to the contrary, the recent settlement of the State debt is due exclusively to the influence of the decisions of the Supreme Court in *Hucless v. Childrey* and in *Vashon v. Greenhow, supra*. In view of those decisions, and being entirely satisfied that the coupon feature of the act of 1871, which is distinct and separable from the main feature of the act, is tainted with the vice of illegality, which renders the whole coupon contract illegal and void, we take, in view of said Supreme Court decisions, the one additional and necessary step, and declare the whole coupon contract absolutely illegal and void. This leaves the bond and coupon-holders to accept the terms of the recent settlement or to pursue the ordinary remedies for the collection of their principal and interest;

Opinion.

and by either mode they will get more than they are in good conscience entitled to. For these reasons we reverse and annul the judgments respectively in each of the above-named cases.

LEWIS, P., dissented.

JUDGMENT REVERSED.

Richmond.

CHESAPEAKE & OHIO R. R. Co. v. HAFNER'S ADM'R.

MARCH 22d, 1894.

RAILROAD COMPANIES—*Brakeman—Low bridge.*—Such company is not liable for the death of a brakeman who was struck by the fourth sill of a dangerously low bridge after he had passed safely under the three first sills by stooping and lowering his head, when he had full knowledge of the dangerous character of the bridge, and the accident was due to his negligently raising his head too soon, his own negligence being the proximate cause of the injury.

Error to judgment of circuit court of city of Williamsburg, rendered November 26, 1891, in an action wherein John Weckert, administrator of Charles M. Hafner, deceased, was plaintiff, and the Chesapeake and Ohio Railroad Company was defendant. The verdict was for \$10,000 damages in favor of the plaintiff. The defendant having filed bills of exception to several rulings of the trial court, brought the case here on error. Opinion states the case.

H. T. Wickham, W. J. Robertson, Henry Taylor, and A. S. Segar, for plaintiff in error.

Edmund Waddill, Henley & Peachy, and A. C. Peachy, for defendant in error.

LACY, J., delivered the opinion of the court.

The case is as follows: The action was trespass on the case by the administrator of Charles M. Hafner, a deceased brake-

Opinion.

man, in the employ of the defendant company, for the negligent killing of his intestate on the 29th day of October, 1890, by collision with an overhead bridge in the city of Williamsburg, while the train on which he was serving as brakeman was passing under said overhead bridge. The jury rendered a verdict for the plaintiff in the sum of \$10,000 damages, upon which the trial court rendered a judgment in accordance with the same; whereupon there was a writ of error awarded by this court upon the petition of the plaintiff in error.

The evidence shows that the deceased had been employed by the R. & A. R. R. as brakeman four months before he applied for employment with the plaintiff in error company. Upon application to the plaintiff in error company for employment he was given a free pass over the road from Charlottesville to Newport News, and required to inform himself of his duties and the character of the road. He was a man of full age, with no defect in his eyesight or hearing. He frequently passed under this bridge by day and by night, safely in the discharge of his duty, without injury. On the occasion of the accident which caused his death, he was struck on the head, as is stated by a witness who stood on the bridge and says he heard the blow, by the sill or stringer of the bridge on the west side of the bridge, the train going west at the time of the accident; so that he had passed in safety under three sills of the four supporting the bridge. He stooped or lowered his head under it, and raised it just before he got from under it. The character of the injury received from the collision with this sill was never ascertained, because, descending by the step-ladder, he fell off the car, and across the track, and his head was cut in twain by the wheels of the car, and his body otherwise badly mutilated. The bridge is shown to have been a dangerous one, being only 28½ inches above the car, which dangerous character was known to the company, and was also known to the said brakeman. While dangerous in character, its danger could, however, be avoided by stooping low enough in passing

Opinion.

under it, as is shown by the number of times he passed under it, and the number of times others pass and repass, without injury. The train in question was halting at the station to take the siding, to allow a meeting train, presently due, to have the main track. It is alleged that there was a call for brakes here as the station was reached. The evidence is conflicting on this point, it being otherwise testified to that the long whistle sounded was simply a blow for the station; but we must consider this case, as other like cases upon a demurrer to the evidence, under the well-known rule of this court prescribed by statute. It was also insisted upon, in its testimony by the plaintiff in error, that there was no collision with the bridge, but that the deceased slipped in descending from the car, as the train was coming to a halt, and was killed by being run over by the train; but here, again, the rule of decision applies, and it must be conceded that his head struck the bridge as stated. The negligence of the company set up is having this dangerous bridge over its road.

The defendant company moved the court to instruct the jury that though they believe from the evidence that the bridge in controversy on the defendant's road was constructed too low to permit C. M. Hafner, in the discharge of his duty, to pass thereunder, sitting on the roof of the car in question, without stooping, or standing on the brake step of said car without stooping, and that thereby said bridge was rendered dangerous, and that, though the jury may believe that the death of C. M. Hafner was caused by the lowness of the bridge, yet, if the jury shall further believe from the evidence that the said C. M. Hafner, at the time that he entered the defendant's service, or afterwards, in the discharge of his duty as brakeman, knew, or had opportunity to observe and learn, the dangerous character of said bridge, and, notwithstanding, continued in the defendant's service, then the plaintiff cannot recover in this action, and they must find for the defendant, and that though they believe from the evidence that, after the engine

Opinion.

and two box cars had passed the warning ropes, the engineer called for brakes, and that said C. M. Hafner obeyed said call, and, in approaching said bridge, was engaged in working said brakes, and while so engaged, was struck by said bridge and killed, yet if the dangerous character of said bridge was known to said C. M. Hafner, or if he had an opportunity to become acquainted with the dangerous character of said bridge, and the danger therefrom was open and obvious, the plaintiff cannot recover in this action, and they must find for the defendant, which the court refused to give as asked, and added that, if the exigencies of his position required him to remain at the post of danger, whereby he was killed, they must find for the plaintiff, and instructed the jury that if they believed that the said bridge was dangerously low, and that, by reasonable care, he could not have avoided the danger, they should find for the plaintiff. When the verdict was rendered, the defendant moved the court to set it aside as contrary to the law and the evidence, which motion the court overruled, and the plaintiff assigns this action of the court as error, as well as the refusal of the court to give its instructions as asked.

The questions involved here are well settled. The case of *Clark's Adm'r v. Richmond & D. R. R. Co.*, 78 Va., 709, is a case where a brakeman was killed by collision with an overhead bridge, and a similar action resulted. In that case it was said by this court: "Where a servant enters upon an employment, he accepts the service subject to the risks incidental to it. An employee who contracts for the performance of hazardous duties assumes such risks as are incident to their discharge from causes that are open and obvious, the dangerous character of which causes he had opportunity to ascertain. If a man chooses to accept employment or continue in it with the knowledge of the danger, he must abide the consequences so far as any claim against his employer is concerned." *Clark v. Railroad Co.*, *supra*, and cases cited.

In that case the employee did not stoop, and it was held

Opinion.

negligence on his part, which was the proximate cause of the injury, and that he could not recover. In this case he did not stoop low enough all the way under the bridge, but negligently raised his head too soon, and was struck; while others situated precisely as he was, did stoop low enough, and were unharmed. This was clearly contributory negligence on his part, which was the proximate cause of his injury, and he cannot recover, and the circuit court erred in its action in refusing to set aside the verdict and grant the defendant a new trial, and in refusing to give the defendant's instruction, and in the instructions given on the motion of the plaintiff, for which errors the judgment will be reversed and annulled, and the case remanded, for a new trial to be had therein, to the circuit court of Williamsburg and county of James City. *Sheeler v. C. & O. R. R. Co.*, 81 Va., 202; *R. & D. R. R. Co. v. Risdon*, 87 Va., 339; *Cottrell's Case*, 83 Va., 512; *Darracott's Case*, 83 Va., 294; *Lee's Case*, 84 Va., 645; *Patteson's Case*, 84 Va., 769.

JUDGMENT REVERSED.

Richmond.

MASSEY v. YANCEY & ALS.

MARCH 22d, 1894.

1. HUSBAND AND WIFE—*Postnuptial settlements*.—Such settlements presumed voluntary. Burden of proving valuable consideration on those claiming under them. As against his creditors neither he nor she is competent to testify, nor are his verbal or written declarations admissible in support of the settlements. *De Farges v. Ryland*, 87 Va., 404.
2. IDEM—*Transfer of stock—Case at bar*.—As against creditor of husband garnisheeing stock, his assignment to his wife endorsed upon the certificate, and reciting that it is for value received, held not a valid transfer thereof in a case where the evidence shows that he had subscribed for it, that it always stood in his name, and the company's books evinced no transfer and no payment of the transfer fee; that payment of monthly dues was always by his checks; that recently before the garnishment he had presided at a meeting of the stockholders and mentioned no assignment or proxy; that she had no separate estate and never laid claim to the stock before filing the interpleader.

Argued at Staunton. Decided at Richmond.

Error to judgment of the circuit court of Augusta county, rendered at May term, 1892, upon suggestions filed in circuit court of Rockingham county by Edward S. Yancey and wife against John E. Massey and others, John E. King and wife against same, and Joseph N. Massey and wife against same, asserting a liability on the Virginia Land and Loan Company, the Sherwood Land Company, W. L. Fleming, A. C. Braxton, trustee, and H. C. Braxton, trustee, by virtue of the liens of their respective writs of *feri facias* issued from the clerk's

Statement—Opinion.

office of the last-named court on September 8, 1891, on a decree thereof against John E. Massey and Franklin Pence in favor of Fanny Yancey, Emma King, and — Massey, each, for the sum of \$1,023 98½, with interest on \$761 32 from July 15, 1866, and \$29 79 costs; and upon the interpleader filed in those proceedings by Mrs. Mattie E. Massey, wife of said John E. Massey. The judgment being adverse to said Mrs. Massey, she brought the case here upon error. Opinion states the case.

Wm. Patrick, for plaintiff in error.

A. C. Braxton and *W. L. Yancey*, for defendant in error.

RICHARDSON, J., delivered the opinion of the court.

For the purposes of this case it is only necessary to state, that the Virginia Land and Loan Company, on the 10th day of October, 1891, filed its answer to the effect that John E. Massey is the subscriber and owner of fifty shares of its capital stock on which he has paid \$800, leaving \$4,200 still due, according to the terms of its constitution and by-laws, and that the respondent has no other property of the said John E. Massey in its possession or under its control.

On the 11th day of May, 1892, the said John E. Massey filed his answer, sworn to and subscribed by him, stating that the stock in the Virginia Land and Loan Company belonged not to him, but to his wife; Mrs. Mattie E. Massey, who bought and paid for it long before the service of the garnishee, and to whom said company was directed to transfer it, and that it does not now stand on the books of that company in her name, is not the fault of himself or of Mrs. Massey, but of the company.

And on the 16th of May, 1892, Mrs. Massey filed her petition of interpleader as follows: "The petition of Mattie E.

Opinion.

Massey represents that the fifty shares of the stock of the Virginia Land and Loan Company, mentioned in the proceedings, do not belong to the garnishee debtor, but do belong to her, and that she bought and paid for it, and the shares were assigned to her on the 22d day of October, 1890." The following is the certificate (No. 330) with the assignment endorsed :

"This is to certify that John E. Massey has this day subscribed to fifty shares of the capital stock of the Virginia Land and Loan Company, on the terms and conditions set forth in the constitution of said company, transferable only on the book of the company in person or by attorney on surrender of this certificate; and paid to the treasurer of said company one hundred dollars in full of the membership fee and first instalment thereon of one dollar per share, and will be entitled to a certificate for said stock when fully paid for according to the constitution." Across the face of which paper there was in print the following words and figures: "Shares \$100, each." On the back of the paper were the following words and figures: "For value received, I assign the within to Mrs. Mattie E. Massey.

[Signed.]

"JOHN E. MASSEY."

The proceedings in these causes having been commenced in the circuit court of Rockingham county were, for cause, removed to the circuit court of Augusta county, where the judgment complained of was rendered.

At the trial the plaintiffs demurred to the evidence introduced by the interpleader, Mrs. Mattie E. Massey, who joined in the demurrer.

The substance of the evidence in the demurrer is this: W. H. Koble, trustee of said John E. Massey's first wife, testified that in the latter part of August, or the first part of September, 1890, at the request of said Massey, he called on Mr. Fifer, clerk of the Virginia Land and Loan Company, in Staunton, and told him that Mr. Massey had requested him to

Opinion.

call and have the stock then standing in his name on the company's books transferred to his wife, the interpleader, and to show his authority, he read to Fifer a letter from Mr. Massey, which had been destroyed, and that no one had spoken to or communicated with witness on the subject prior to the service of the garnishee on the company. Counsel for the interpleader also showed to the witness the paper heretofore mentioned, purporting to be the certificate (No. 330) of stock given to Mr. Massey by the company, dated May 5, 1890, with the endorsement thereon of the assignment to Mrs. Mattie E. Massey by Mr. Massey, and was asked by the said counsel in whose handwriting the endorsement of assignment was. To this question and the answer, which was that it was in the handwriting of said John E. Massey, the counsel for the defendants in error objected, but the court overruled the objection, and they excepted to the ruling of the court. Thereupon the said certificate, with the endorsements thereon, were read to the jury as evidence for the interpleader; and she rested her case.

The defendants below introduced Fifer, who testified that he was the book-keeper from the latter part of May, 1890, and the secretary and treasurer of the company from either January or July, 1891, and that there was standing on the books, at the time of his testifying, fifty shares of its capital stock in the name of John E. Massey, who subscribed for the same, and that so far as the books and receipts of the company show, and as the witness knew, said John E. Massey was still the owner of the said shares of stock. The witness then produced a paper which he said was the original subscription of John E. Massey to the stock, in the words and figures following, to wit:

"No agent has authority to vary terms of this subscription, or collect money. Make all checks payable to W. L. Waters, Jr., treasurer."

"I, John E. Massey, of P. O. Richmond city and State of

Opinion.

Virginia, do hereby subscribe to fifty shares of the capital stock of the Virginia Land and Loan Company, of Staunton, Virginia, on the terms and conditions set forth in the constitution of said company, receipt of a copy of which I do hereby acknowledge, and I hereby recognize and abide by all of the provisions of said constitution, or any legal amendment thereof, and the same is hereby made the basis and a part of this contract between me and said company this 30th day of April, 1890.

[Signed]

JOHN E. MASSEY,

Subscriber."

Across the face of this paper was stamped in pink ink and large letters the following words: "See notice on back made part of this contract." The notice, however, is omitted, as it can have no bearing on any question raised in this case.

The witness also stated that the stock subscribed for was the same stock for which certificate No. 330, hereinbefore set forth, was issued; and that from the date of said subscription up to the time of the service upon the company of the garnishees, to wit: September 10, 1891, the stock stood upon the company's books in the name of the said John E. Massey, and that the monthly instalments falling due thereon, amounting to \$50 per month, were regularly paid by checks of said John E. Massey; that witness had no recollection whatever of Mr. Koble having spoken to him of the transfer of the stock to Mrs. Massey until after September 10, 1891; that he could not have transferred said stock on the request of Koble, because the terms and conditions provided for by the by-laws of the company for the transfer of same had not been complied with. The witness thereupon produced a copy of said by-laws and read therefrom the following:

"Section 5. Assignment of stock.—Stock in this company, on which all fines and other charges have been fully paid, may be transferred by the owner thereof to any other person com-

Opinion.

petent to hold stock in this company, upon the payment to the company of 25 cents per share, and the transferee shall be entitled to the same privileges and subject to the same liabilities as the original owner. No stock shall be transferred on the company's books except as above provided. The person in whose name the stock stands on the company's books shall be deemed the owner thereof as regards the company."

The witness testified that the 25 cents fee had never been paid by Mrs. Massey nor by any one else, and that the original certificate of stock had never been returned to the company; that the payments had all been made by Mr. Massey's checks, and the receipts made off in his name and sent to him; that a meeting of the stockholders of the company was held on the 12th of August, 1891, notice whereof was mailed to Mr. Massey as one of the stockholders; that the fifty shares were all the stock ever owned by him in the company; that he appeared at the meeting as such stockholder, said nothing at that time about having assigned the stock, or that he held a proxy therefor; that in October, 1891, he called at the company's office and asked witness to show him his stock account, which he did; that Mr. Massey examined it, stated to witness that he wished the stock put in his (Massey's) wife's name; that witness declined to do so, explaining that the company had been garnisheed for the stock; that Mr. Massey remarked that it ought to have been in his wife's name before that, but did not ask why it had not been transferred to her, nor express surprise that it had not been done; that witness advised that Mr. Massey should put in a withdrawal notice for the stock so as to prevent fines being charged up against it, and that on that Mr. Massey gave notice to withdraw the stock. The witness further said that after he explained why the stock could not then be transferred on the company's books to Mrs. Massey, he (Mr. Massey) said nothing more about it; that Mrs. Massey never had claimed the stock, so far as witness know, from the company or any of its officers, either verbally or in writing.

Opinion.

The witness then produced the minutes of the stockholders' meeting of August 12, 1891, which showed that on motion of Mr. Braxton, the said John E. Massey was elected chairman of the meeting. Other witnesses testified that Mr. Massey was present at said meeting and presided over it, and that nothing was said about his being proxy for any one else. This was all of the evidence.

The circuit court, on the 8th day of June, 1892, decided in favor of the demurrants, and ordered that the sheriff should receive from the Virginia Land and Loan Company the said fifty shares and sell the same, and out of the proceeds pay the costs of the garnishee proceedings, and the costs of the sale, and distribute the residue equally between the plaintiffs aforesaid. To this order the interpleader, Mrs. Massey, by her attorney, excepted, and the case is here on a writ of error and *supersedeas*.

Upon mature consideration, and after giving the plaintiff in error the full benefit of the rule of decision pertaining to demurrers to evidence, we are of opinion that the judgment complained of is without any error prejudicial to the plaintiff in error.

It is settled law in this State, that all postnuptial settlements are presumed to be voluntary, and that the burden of proving they were made upon valuable consideration, is upon those claiming under them; that recitals in such settlements are evidence against persons claiming under the settler, but not against creditors of the settler contesting the validity of the settlement; and that when husband and wife are both parties to the suit and interested in the result, neither is competent to testify in the case. *Blow v. Maynard*, 2 Leigh, 29; *Perry v. Ruby*, 81 Va., 317; *DeFarges v. Ryland*, 87 Va., 404.

And if a husband is incompetent to testify in behalf of his wife, it is clear that neither his verbal nor his written declarations can be plead in her behalf in a litigation between her and his creditors. To hold otherwise would be the absurdity

Opinion.

of holding that it is allowable for a man to do indirectly, and without the sanction of an oath, what he is not allowed to do directly with the sanction of an oath.

But in the present case the assignment from the husband to his wife was not a post-nuptial settlement, but a bargain and sale for value received, from him to her, as under chapter 103, Code 1887, she had the same power to contract, with reference to her separate estate, as if sole.

If this be true, would there not be the same lack of proof of the assignment and of a valuable consideration? There is, however, no evidence in the record even tending to show that Mrs. Massey possessed any separate estate; and is it not true that the statute conferring on married women the capacity to contract extends only to such of them as possess separate estate? But we do not mean to decide the question last suggested, as its decision is not necessary to a proper decision of the case in hand.

For the plaintiff in error it is contended that the said certificate of stock passed to her by delivery, and that possession thereof is *prima facie* evidence of delivery to and ownership in the possessor, it appearing that the certificate of stock was in the possession of her counsel and by whom it was presented to the circuit court. We have not the least hesitation in holding that, under the peculiar circumstances of the case, which are portrayed by the evidence in the record, the fact that the certificate of stock was in the possession of the interpleader, or in the possession of her counsel, and was by her or her counsel presented to the trial court, possesses not the slightest weight or tendency towards indicating that there had been a *bona fide* assignment of said certificate by the garnishee debtor, Mr. Massey, to his wife, the interpleader, for a valuable consideration anterior to the service of the garnishee summons. The relations subsisting between the parties to the alleged assignment, the stock standing on the books in the name of Mr. Massey, his representation thereof in the meeting of the stock-

Opinion.

holders as though he was still the owner, and the rules of the company regulating and restricting the transfer of stock, with which he was well acquainted, and other significant facts, all combine in destroying every vestige of solid ground upon which to found a presumption of ownership in the interpleader that, under different circumstances, might possibly arise from the possession of the certificate. For these reasons we are of opinion that the judgment complained of is clearly without error, and that the same must be affirmed.

LEWIS, P., and FAUNTLEROY, J., dissented.

JUDGMENT AFFIRMED.

Richmond.

COLEMAN V. COMMONWEALTH.

MARCH 22d, 1894.

CRIMINAL PROCEEDINGS—*Presence of accused.*—It is the well established practice in this State that a prisoner accused of felony must be arraigned and plead and appear in person in all the subsequent proceedings, and the fact of such attendance must appear upon the record. *Bond's Case*, 83 Va., 581.

Error to judgment of circuit court of Goochland county, rendered September 18, 1893, affirming judgment of county court of said county, rendered June 19, 1893, whereby, in accordance with the verdict of the jury upon trial of an indictment against the plaintiff in error, James Coleman, for murder in the first degree, he was sentenced to be hanged. Opinion states the case.

Wm. M. Justice, Jr., R. V. Marye, and A. X. Monteiro, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

FAUNTLEROY, J., delivered the opinion of the court.

The record discloses that James Coleman, the plaintiff in error, was indicted in the county court of Goochland county on the 20th day of February, 1893, for the murder of Rober-son Winston on the 25th day of November, 1892, in the said

Opinion.

county. And on the same day, to wit, at a court held for Goochland county, at the court-house of said county, on the 20th day of February, 1893, James Coleman, who was this day indicted by the grand jury for murder, was this day set to the bar in custody of the jailer of this county, and, being thereof arraigned, pleaded not guilty to the said indictment; whereupon, for reasons appearing to the court, the trial in this case is ordered to be continued until the third day of March court next, at the prisoner's costs, and the prisoner remanded to jail. And at another day, to wit, at a county court held for Goochland county, at the court-house, &c., on the 3d day of March, 1893, for reasons appearing to the court, the trial of this case is ordered to be continued until the first day of April court next, at the costs of the prisoner. And at another day, to wit, at a county court held for the said county of Goochland, at the court-house, on Monday, the 17th day of April, 1893, the prisoner, James Coleman, was set to the bar in custody of the sheriff of this county, &c.

The record in this case is fatally deficient in what the law prescribes as essentially necessary to be stated, that the prisoner was present, in person, in the county court of Goochland, on the 3d day of March, 1893, when, "for reasons appearing to the court the trial of this case is ordered to be continued until the first day of April court next, at the costs of the prisoner." In *Sperry's Case*, 9 Leigh, 624, Judge Lomax said: "In this record it is stated that on the 29th of September, 1837, the accused was led to the bar in custody of the keeper of the jail, and, thereupon, was arraigned and pleaded; and on his motion the cause was continued till the first day of the next term, and thereupon he was remanded to jail. And afterwards, at a circuit court, &c., held on the 27th of April, 1838, came as well the attorney for the commonwealth, as the prisoner *by his attorney*, and thereupon came a jury, &c. An appearance by attorney cannot imply that the prisoner was personally present in court; and therefore the record is deficient in

Opinion.

what the law regards as essential to be stated in such a case. For this error, therefore, the judgment must be reversed and a *venire facias de novo* awarded. The well established practice in England and in this State is, that a prisoner accused of felony must be arraigned in person, and plead in person; and, in all subsequent proceedings, it is required that he shall appear in person." "And the fact of such attendance should appear upon the record." Chitty Cri. Law, 411, 414; see *Bond's Case*, 80 Va.; and *Shelton's Case*, 89 Va., 450; *Hooker's Case*, 18 Gratt., 763. In the record in the case at bar, it does not even appear that the prisoner was present by attorney; or that there was even a motion for the continuance of the case which was ordered by the court in the absence of the prisoner. There are other errors assigned in the petition in this case; but as the case must be remanded, for the reasons already stated, we deem it unnecessary to consider them. The judgment complained of is wholly erroneous and the same is reversed and annulled, the verdict set aside, and the case remanded for a new trial.

JUDGMENT REVERSED.

Richmond.

SMYTHE v. SMYTHE.

MARCH 22d, 1894.

1. *WILLS—Construction—Power to sell.*—Testator bequeaths his estate to his two sisters for their lives, with power to sell if they deem it desirable, but desires them to reinvest or loan the proceeds in some safe manner and avoid consuming the principal; and at the death or marriage of both, any property remaining to go to his adopted son: *held*, the bequest gives the sisters not an absolute fee simple, but only a life estate, with a valid limitation over to the adopted son.
2. *IDEM—Restraint of marriage.*—A condition in such a devise to testator's sisters that they are to remain sole, and that in case of either marrying, the property shall thenceforth be enjoyed by the one remaining sole, *held* null and void as placing a restraint upon marriage.

Appeal from decree of circuit court of Tazewell county, rendered December 9, 1892, in a chancery cause wherein Kate A. Smythe was complainant and Mattie R. Smythe, James O'Keefe, Mary S. O'Keefe, and Claude Allison, an infant, were defendants. The complainant regarding the decree of the circuit court as adverse, appealed. Opinion states the case.

Henry & Graham, for appellant.

J. H. Stuart, for appellees.

FAUNTLEROY, J., delivered the opinion of the court.

The suit is a friendly suit, instituted to obtain a judicial construction of the last will and testament of Caroline H. Peery,

Opinion.

deceased, and for the ratification and confirmation by the court of a provisional contract for the sale of the real estate devised by the said will.

The will is as follows: "I give and bequeath unto my two sisters, Kate A., and Mattie R. Smythe, all my estate of every kind, both real and personal, of which I may die seized, to be by them used and enjoyed during their natural lives. But the benefits of this bequest are to continue to my said two sisters upon the condition that they shall remain sole. Should either marry, the said property so bequeathed as aforesaid, shall thenceforth be possessed and enjoyed by such one as shall remain sole. The use and enjoyment of said property shall be unrestricted to my said two sisters during their natural lives should they remain sole, carrying with such use and enjoyment the right to sell and convey said real estate should they find it desirable to do so; but I desire that they *shall* reinvest or loan the proceeds of such sale in some safe manner, and, as far as possible, avoid the consumption of the principal; and at the death of my two sisters, or the marriage of both, I desire whatever of my estate may remain, shall vest in and become the property of the little boy, Claude Allison, whom I have adopted."

The bill of complainant states that, on the 1st day of October, 1892, they, the said Kate A. Smythe and Mattie R. Smythe, as devisees of the said testatrix, under the discretion given to them in the said will, contracted to sell the said real estate so devised to them as aforesaid, to James O'Keefe and Mary S. O'Keefe "for a good, and indeed, an excellent price, and they pray that the said sale may be ratified and confirmed by the court."

The circuit court, in the decree appealed from, held that the devisees, Kate A. Smythe and Mattie R. Smythe, had the right to sell and convey the land to the purchasers, James O'Keefe and Mary S. O'Keefe, as set out in the written contract exhibited with the bill, and decreed the confirmation of the said

Opinion.

sale. And also, that the condition placed upon the devise in restraint of marriage is null and void. Of which said points in the decree there is no complaint. The court, in its said decree, decided that Kate A. Smythe and Mattie R. Smythe take under the will only a life estate, and do not take an absolute fee simple estate in the real estate devised by the will; and that the limitation over to the adopted child of the testatrix, Claude Allison, is good. That this case is distinguished from the cases of *May v. Joynes*, *fc.*, 20 Gratt., and *Cole v. Cole*, 79 Va., and that line of cases, in that the intention of the testatrix, as gathered from the language of the will, construed as a whole, is manifest and express to give only a life estate to her two sisters and devisees, Kate A. Smythe and Mattie R. Smythe, coupled with the power of sale and reinvestment or loan; and the right to sell and reinvest in some safe manner is coupled with the behest that, as far as possible, the consumption of the principal shall be avoided. And the specific direction to reinvest or loan the proceeds of the sale of the real estate (if made at all) clearly intends *not* to vest the proceeds of sale or any part of it, in the said devisees absolutely, but only for their natural lives, with remainder in fee to the little boy, Claude Allison, the adopted child of the testatrix.

We are of opinion that the construction of the will by the circuit court, as aforesaid, is just and proper. In the case of *May v. Joynes* the limitation or remainder over of whatever may remain at her death followed the devise, with power of unrestricted and unlimited disposal, in any manner, by deed or will, and expressly subject to debts or legacies of the first taker; but in Mrs. Peery's will the estate is given for use and enjoyment during the natural lives of the devisees, with the power of sale coupled with the direction of the testatrix, that "they *shall* reinvest or loan the proceeds of such sale in some safe manner, and, as far as possible, avoid the consumption of the principal; and at the death of my two sisters, or the marriage of both, I desire whatever of my estate may remain (so

Opinion.

invested or loaned in some safe manner) shall vest in and become the property of the little boy, Claude, whom I have adopted.”

We do not think that a just and fair construction of this will will defeat the expressed and indisputable intention of the testatrix, by holding that the *legal operation* of the terms of the will gives to the devisees an absolute estate in fee simple; *non obstante* “the plain intention to the contrary appearing by the will itself.” It is plainly provided in the will that the devisees—the two sisters of the testatrix—shall enjoy and consume the rents and profits of the land devised, or if sold, use the interest of the proceeds of sale, which shall be reinvested or loaned in some safe manner so as to avoid, as far as the contingences of life and experience will make it possible, the consumption or diminution of the principal, which, at the death of the said devisees, shall vest in and be the property of the remainderman, Claude Allison. The fund is a large one—\$9,825—and will afford ample support to the two unmarried sisters and devisees of the testatrix for their natural lives.

The other details of the decree are not complained of; and our judgment is to affirm the decree of the circuit court of Tazewell appealed from.

LEWIS, P., and RICHARDSON, J., dissented.

DECREE AFFIRMED:

Richmond.

HOTCHKISS v. GRATTAN, JUDGE.

MARCH 22d, 1894.

MANDAMUS—*Jurisdiction—Answer.*—Code, section 3094, providing that a writ of *mandamus* shall issue and be tried at the place of session of this court at which writs of error to such court are to be tried, *held*, controlling as to the place where the jurisdiction in the present case is to be exercised.

Application for a writ of *mandamus*.

J. B. Stephenson, W. Liggett, J. A. Alexander, and F. B. Kennedy, for applicant.

W. E. Craig, and Patrick & Gordon, for respondent.

LEWIS, P., delivered the opinion of the court.

This is an application by Jed Hotchkiss and others, in the original jurisdiction of the court, for a *mandamus* to compel the Honorable Charles Grattan, judge of the hustings court of the city of Staunton, to issue a writ for a special election upon the question of granting or not granting liquor license in the said city, pursuant to the provisions of chapter 25 of the Code.

It appears from the petition and accompanying papers that the petitioners applied by petition to the said court, on the 10th of January last past, for the issuance of a writ for such an election, which was refused.

Opinion.

An answer of the defendant, the Honorable Charles Grattan, judge as aforesaid, was filed at the same time that the petition in this court was filed, in which the right of the petitioners to the writ is controverted at length.

When the petition was offered at the bar, a doubt was expressed from the bench as to the jurisdiction of the court to take cognizance of the case at this place of session; and this doubt has been confirmed by a subsequent examination of the statute, which enacts as follows: "Writs of prohibition or *mandamus* from the Court of Appeals to any court shall issue and be tried at the place of session of said Court of Appeals at which writs of error to such court are to be tried." Code, sec. 3094. And section 3091 provides that the court at its session at Staunton shall hear and determine all appeals and writs of error which may be brought to the court from or to decrees or judgments of certain courts, including the hustings court of the city of Staunton. So that while jurisdiction to issue writs of *mandamus* is conferred upon this court, in general terms, by section 3086, the place or places at which the proceedings must be commenced is prescribed by section 3094.

No doubt a case which is regularly on the docket at one place of session may be transferred to, and heard at another place of session, under the provisions of section 3093; but this is not in conflict with section 3094. Nor is there anything in *Clay v. Ballard*, 87 Va., 787, that bears upon the present case. There it was said that the legislature has conferred upon this court unrestricted original jurisdiction to issue the writ according to the principles of the common law; but the place at which the jurisdiction is to be exercised is regulated, not by the common law, but by the statute; and if it be "necessary to prevent a failure of justice" that the court shall have jurisdiction to issue the writ at any place of session, regardless of the locality from which the case comes, that it is a matter for the consideration of the legislature.

It is contended, however, that the defendant has waived the

Opinion.

right to object to the jurisdiction by filing his answer without raising the question of jurisdiction, and it is insisted that the right can be waived, because "the only reason for section 3094 is for the benefit or convenience of the defendant." Whatever may have been the object of the enactment, the language is clear that the writ "shall issue and be tried" at the place prescribed. Without, however, deciding whether the provision of the statute can be waived as respects the place at which the proceeding is to be instituted, it is enough to say that the petition in the present case was filed subject to the opinion of the court as to the true construction of the statute; and that being adverse to the supposed right to file the petition here, it follows that the petition must be dismissed. Its dismissal, however, will be without prejudice to the petitioners' right to hereafter apply for the writ at Staunton, if they shall be so advised.

MANDAMUS DENIED.

Richmond.

GRINBERG & MORRIS v. SINGERMAN.

MARCH 22d, 1894.

ATTACHMENTS—*Where returnable.*—Under Code, § 2964 and § 2965, attachments must be made returnable to a term of the court wherein the same is pending. *Craig v. Williams, ante*, p. 500.

Argued at Wytheville. Decided at Richmond.

Appeal from decree of the corporation court of the city of Roanoke, rendered March 21, 1891, in a suit in equity wherein Grinberg & Morris were plaintiffs and Singerman & Rothman were defendants. Opinion states the case.

S. Griffin, for appellants.

Penn & Cocke, for appellees.

LEWIS, P., delivered the opinion of the court.

This was an attachment in equity in the corporation court of the city of Roanoke. The attachment was issued in a pending suit under section 2964 of the Code, and was made returnable to January rules, 1891. Depositions were taken, and at the hearing the bill was dismissed.

Two questions have been raised in this court, but it will be necessary to consider one only; and that is as to the validity of the attachment.

Opinion.

Section 2965 of the Code provides that any attachment issued under section 2964, or any other section of chapter 141, if issued in a pending suit, "shall be returnable to a term of the court in which the same is pending." Prior to the enactment of the Code the statute authorized such an attachment to be made returnable to a term of the court *or to a rule day*; but as the latter provision was left out of the Code, the effect was to vitiate the attachment issued in the present case, on the principle that process made returnable to a day which is not a legal return day, is void. *Kyles v. Ford*, 2 Rand., 1.

This subject was considered in the recent case of *Craig v. Williams*, *ante*, p. 500, in which case it was held that under the Code, changing the previous law, there is no lawful authority for making an attachment issued in a pending suit returnable to rules; and nothing need be added to what was there said.

The result is that as the foundation of the present suit was a void attachment, there is no error in the decree dismissing the bill.

DECREE AFFIRMED.

Richmond.

SAUNDERS v. LIPSCOMB.

MARCH 22d, 1894.

1. JUDGMENTS CONFESSED—*Statute—Common law.*—Though Code, § 3233, provides that *in any suit* defendant may confess judgment in the clerk's office, *held*, a judgment there confessed is not invalid because there was *no suit pending* and no previous process issued, as judgments by confession existed at common law whereof the statute is mainly declaratory, and only substantial compliance is required to validate such a judgment. *Brockenbrough v. Brockenbrough*, 31 Gratt., 509.
2. *IDEM—Minute book.*—Code, § 3283, requiring clerk to enter in his order or minute book a judgment confessed in his office, *held* directory only, and his failure to do so does not invalidate the judgment. *Shadrach v. Woolfolk*, 32 Gratt., 707.

Appeal from decree of circuit court of King William county, rendered May 22, 1891, in the chancery suit pending therein under the short style of Saunders & Son against Lipscomb and others. The decree being favorable to the defendants, C. A. Lipscomb and J. S. Moore, creditors of H. B. Lipscomb, the complainants, Saunders & Son, appealed. Opinion states the case.

George P. Hurd, for appellants.

Shields & Newton and *H. R. Pollard*, for appellees.

RICHARDSON, J., delivered the opinion of the court.

Opinion.

This is an appeal from a decree of the circuit court of King William county pronounced on the 22d day of May, 1891, in the chancery suit pending therein under the short style of Saunders & Sons against Lipscomb and others.

The complainants, who were creditors of H. B. Lipscomb by judgments regularly obtained, April 30, 1890, brought their bill to enforce the liens of their judgments against the real estate of their debtor, and also to have set aside and annulled a judgment confessed July 23, 1889, by Thomas Redd, attorney in fact for H. B. Lipscomb, in favor of J. S. Moore for \$350, with interest thereon from the 14th of May, 1889; which judgment was confessed in the clerk's office of the circuit court of King William county under and by virtue of a power of attorney duly executed and acknowledged by said H. B. Lipscomb, May 14, 1889, to said Thomas Redd, attorney as aforesaid, as appears from a copy from the record thereof, attested by the deputy clerk of said county; and also to set aside and annul another judgment confessed in said clerk's office on the 14th day of April, 1890, by said H. B. Lipscomb, in person, to C. A. Lipscomb for the sum of \$730, with interest and costs.

Of the first mentioned judgment there is in the record the following memoranda: "I confess judgment in favor of J. S. Moore for the sum of \$350, with interest from May 14, 1889, till paid and cost. H. B. Lipscomb, by Thos. Redd, his attorney in fact."

"Virginia: In King William circuit court, clerk's office, July 22, 1889.—The foregoing judgment was this day confessed before me in my office aforesaid. Burnley Taylor, Deputy Clerk."

It was agreed in a writing copied into the record and signed by the counsel of both parties, that "no memorandum of suit was filed, nor any declaration, and no process was issued against the defendant in this matter, and that there was no counsel connected with it, and that the above is a full copy of the only paper in the matter, except that the judgment was duly entered

Opinion.

on the minute book of the court in vacation, 'Endorsed—The above judgment has been docketed according to law. Burnley Taylor, Deputy Clerk.'"

Of the last named judgment there is in the record the following memoranda:

"In King William circuit court, April 14, 1890: C. A. Lipscomb, plaintiff, v. H. B. Lipscomb, defendant. Judgment confessed in the clerk's office in favor of the plaintiff for seven hundred and twenty dollars, with interest thereon to be computed at the rate of six per cent per annum from the 14th day of April, 1890, till paid, and the costs. Plaintiff's costs \$6. An extract. Teste: Burnley Taylor, Deputy Clerk.

"Endorsed.—The above judgment has been docketed according to law.—Burnley Taylor, Deputy Clerk."

The following is the bond on which said judgment was confessed:

"One day after date I promise and bind myself, my heirs, or assigns, to pay to Mrs. C. A. Lipscomb, her heirs or assigns, the just and full sum of (\$720) seven hundred and twenty dollars for services from January 1, 1883, to March 1, 1890, as storekeeper for said debt, and waive the benefit of my homestead and all other exemptions of law. Given under my hand and seal this 1st day of March, 189—. H. B. Lipscomb. (Seal)."

"And on the same day: In King William circuit court clerk's office, April 14, 1890: C. A. Lipscomb, plaintiff, v. H. B. Lipscomb, defendant. This day the plaintiff, by her attorney, and the defendant appeared in person. Thereupon the defendant in person acknowledged the plaintiff's action for the sum of seven hundred and twenty dollars with interest from the 14th day of April, 1890, till paid. It is therefore considered that the plaintiff recover of the defendant the sum of seven hundred and twenty dollars, with interest thereon to be computed at the rate of six per cent per annum from the 14th day of April, 1890, until paid, and her costs about her suit

Opinion.

in this behalf expended. From the records. A copy—Teste: Burnley Taylor, Deputy Clerk.”

In reference to this judgment a statement of facts was agreed to by the counsel, substantially as follows: “H. B. Lipscomb’s son took to the clerk’s office in said county the bond of \$720 to C. A. Lipscomb whereon was endorsed the judgment confessed before a justice of the peace, and asked that it be docketed; but being told it was not a judgment, he returned it home; whereupon, on the 14th day of April, 1890, H. B. Lipscomb himself took it to the said clerk’s office, when and where Burnley Taylor, the deputy clerk of the circuit court of said county, took the confession of judgment and endorsed it on the bond. And it was further agreed that there was no memorandum of suit or declaration, or any other paper except the bond filed in the matter, and that there was no counsel connected with it.”

In the bill these two judgments were assailed and asked to be set aside and annulled on the grounds, first, that they were confessed by H. B. Lipscomb with interest to hinder, delay, and defraud his creditors, and especially the complainants; and, second, that they were not confessed in any pending suit.

J. S. Moore and C. A. Lipscomb filed their separate answers denying the material allegations of the bill; and depositions were taken by both complainants and defendants. At the hearing the circuit court held that both of said judgments were valid liens on the real estate of the defendant, H. B. Lipscomb, and the complainants brought the case here on appeal.

As to the first ground it is sufficient to say that the record contains not a particle of evidence tending to establish it, but on the contrary, as was held by the court below in the decree complained of, these judgments are in all respects fair and in good faith, and are sustained by valuable considerations.

The second ground of objection which has already been decided by this court in *Brockenbrough v. Brockenbrough*, 31 Gratt., 599, and in *Shadrack v. Woolfolk*, 32 Gratt., 707.

Opinion.

The first named case was one in which an obligor in a bond went into court and confessed a judgment thereon to the obligee no suit having been instituted. This court held that the judgment was valid.

In that case, Burks, J., in pronouncing the opinion of the whole court, said: "It is contended that the judgment is void because confessed without a writ being issued. It was confessed in open court, the court having jurisdiction of the subject; and the defendant appeared and confessed judgment in proper person. Such a judgment is not void. The prime object of the writ is to notify the defendant of the plaintiff's action. It was waived by the appearance of the defendant and the confession of judgment. A judgment on confession is equal to a release of errors."

The last-named case was one in which an obligor confessed a judgment on a bond to the obligee in the clerk's office, and though no process appears to have been issued or served, and though no entry thereof was made by the clerk upon the order, or minute, or other book in his office, and although the only evidence thereof was an unsigned endorsement on a declaration appearing to have been filed enclosing the bond, this court held that it was a valid judgment and entitled to rank as such against other creditors of the debtor.

In that case Judge Staples, speaking for the whole court, said: "If the judgment was confessed without writ or previous process, we think it would not, on that ground, be void. In *Brockenbrough v. Brockenbrough*, 31 Gratt., 580, it was held that a judgment confessed in court is valid, though no action was pending. * * * No satisfactory or substantial difference is perceived between a judgment of that sort and a judgment confessed in the clerk's office.

It is very true the statute provides that in *any suit* the defendant may confess judgment in the clerk's office. Inasmuch, however, as the object of the writ is to notify the defendant of the claim asserted, and to give him opportunity of making

Opinion.

defence, if he consents to appear, or waives service of process, and confesses the demand, he cannot afterwards be heard to say that no process was in fact issued. To permit him to do so would be to perpetrate a fraud on the plaintiff, who has been led by the defendant's conduct into an acceptance of the judgment as a valid security."

It is true that the statute, § 3283, Code, 1887, does require the judgment to be entered by the clerk in his order or minute book; but it does not provide that his failure to do so shall invalidate the judgment thus confessed. Moreover, whatever may be the duty of the clerk in respect to recording a judgment by confession, his duty in entering up the judgment in the minute book, under the statute, is purely ministerial and the mandate of the statute merely directory, and his failure is only a clerical error, which may subsequently be corrected by the court, or by the clerk himself. So it was held in the case last cited; and the same principle was upheld by this court in *Diggs v. Dunn*, 1 Munf. 56; *Eubank v. Ralls*, 4 Leigh, 330; *Garland v. Marx*, *Ib.*, 345; *Ins. Co. v. Barley*, 16 Gratt., 388.

Judgments entered for the plaintiff upon the defendant's admission of the facts and the law, were known to the common law and exist independently of statutes, and the Virginia statute, § 3283, Code 1887, being mainly declaratory of the common law, requires only substantial compliance, in order to render valid a judgment *bona fide* confessed in the clerk's office. *Black on Judgments*, § 50.

For these reasons this court is of opinion that the decree complained of is without error, and that the same must be affirmed.

DECREE AFFIRMED.

Note by Reporter.—Entry of judgments confessed on warrants of attorney is discussed in note to *Teel v. Yost* (N. Y.), 13 L. R. A., 796.

Richmond.

COMPTON v. THORN.

MARCH 29th, 1894.

1. **PARTNERSHIP—Dissolution—Contribution—Laches.**—A surviving partner who, after his co-partner leaves the State, takes possession of the assets, which are ample to pay the firm's indebtedness, and assumes control of the business, undertaking to close it up, and fails for thirty-four years to render any account, or make any claim against his co-partner or his estate for contribution for firm debts paid by him: *held*, precluded by his *laches* from claiming such contribution and subjecting his deceased partner's lands, in the hands of his widow and children, to the payment of a share of such debts.
2. **IDEM—Parties.**—Where in such case there was a third partner, also deceased, equally liable for the firm debts, in a suit for contribution by the surviving partner, *held*, the administrator and heirs of such third partner should be parties.

Argued at Wytheville. Decided at Richmond.

Appeal from decree of circuit court of Bland county, rendered October 5, 1891, in a chancery suit wherein John R. Compton was complainant, and the administrator and heirs of Gordon C. Thorn, deceased, were defendants. The circuit court having decreed against the complainant, he appealed. Opinion states the case.

Martin Williams, for appellant.

W. F. Harman, for appellees.

Opinion.

FAUNTLEROY, J., delivered the opinion of the court.

The facts disclosed by the record are, that John R. Compton and Gordon C. Thorn and E. F. Neel were partners in a mercantile firm under the name of E. F. Neel & Co., in the county of Giles, in Virginia, which partnership ceased active business long prior to the late civil war, and was heavily involved in debt, for which suits were instituted in the circuit court of Giles county, where they pended until the formation of Bland county, in 1861, when they were removed to the circuit court of Bland county, where they were continued until 1873; when the said suits were compromised by the execution and delivery of the bonds, with satisfactory security, of the said John R. Compton and said G. C. Thorn, surviving partners, E. F. Neel being then dead, and having, many years previous, left the State of Virginia.

When these bonds became due they were sued upon and judgment was obtained, and executions sued out; and they were paid by the active surviving partner, John R. Compton. G. C. Thorn died previous to the institution of this suit against his widow and heirs and personal representative in 1886, claiming that the said John R. Compton was only justly entitled to pay one-half of the aforesaid debts; and praying for substitution, as to one-half of the payments made by him, against the estate of G. C. Thorn, deceased.

To this bill, Gordon Wohlford, sheriff of Bland county, and, as such, administrator *d. b. n.* of G. C. Thorn, deceased; J. W. Thorn, Angus C. Thorn, G. A. Williams, and M. S. Williams, his wife; M. J. Thorn, Lizzie S. Thorn, Hannah J. Thorn, and Lula M. Thorn, an infant, were made parties defendant.

The said defendants demurred to and answered the bill, denied all the material allegations, and called for strict proof and for a settlement of the partnership accounts; and pleaded the death of parties and lapse of time and *laches*, and the statute of limitations. The answer of Gordon Wohlford, sheriff, &c.,

Opinion.

and as such, administrator, *d. b. n.* of G. C. Thorn, deceased, insists, that John R. Compton, independently of the great lapse of time and death of parties and other grounds of defence, is not entitled to recovery against the estate of G. C. Thorn, deceased, for the matters set up in his bill; but, on the contrary, a fair and lawful settlement between said G. C. Thorn and said John R. Compton of the E. F. Neel & Co. business and assets, will show that said John R. Compton is largely indebted to said G. C. Thorn's estate; and the said answer denies that the said G. C. Thorn's estate is indebted to, or, in any way, liable to said John R. Compton, by reason of the said G. C. Thorn's connection with the E. F. Neel & Co. business or partnership.

The answers of the other defendants deny that the complainant is entitled to recover against the estate of G. C. Thorn, deceased—in the hands of his widow and heirs—on account of the partnership debts in the bill mentioned, which he claims to have paid.

Upon the hearing of the cause the circuit court entered the decree appealed from, dismissing complainant's bill. We are of opinion that the bill was properly dismissed.

It appears from the record that the concern of E. F. Neel & Co.—composed of E. F. Neel, John R. Compton, and G. C. Thorn—did a country mercantile business in Giles county, Virginia (now Bland), for some years previous to the late civil war, quitting business in 1859, at which time E. F. Neel, who had been the active managing partner of the firm, got into trouble and left the State. Then and thereupon John R. Compton, the complainant in this suit, took possession and exclusive control and management of the large stock of goods on hand, and of the accounts and notes due the firm, and undertook to close up and settle the partnership business. The proof is, that the assets of the firm, which went into his hands and under his control, and for which he has never rendered any account (nor stated any in his bill), were ample to meet all the debts and liabilities of the firm; and, now, after the

Opinion.

death of E. F. Neel and of G. C. Thorn—twenty-six years after the firm ceased to do business and eight years after the last payment which he claims to have made of the partnership debts for which he claims contribution—he seeks to subject the lands of G. C. Thorn's estate, in the hands of his widow and children, for the debts of a business concern, with which G. C. Thorn, while living, had no active or managing control or oversight, and of which he, the said John R. Compton, had complete and undivided control, and for which he has never settled or accounted. Even if G. C. Thorn had ever been liable for any part of the two partnership debts of E. F. Neel & Co., for which complainant seeks to subject his estate, his *laches* in failing to prosecute his claim within a reasonable time, and in the lifetime of other parties who had knowledge of the facts, has been such as to make it now inequitable for him to be heard in a court of equity, and the estate of E. F. Neel would be equally bound to contribute, and his personal representative and heirs should have been made parties defendant and made to contribute their just proportion. But E. F. Neel left Virginia in 1859, and died in one of the western States, seized of a valuable tract of 430 acres of land in Bland county, Virginia, which has been divided and assigned to his heirs at law, non-residents of Virginia, by proceedings had for that purpose in the circuit court of Bland county, before the eyes of the complainant, who, by neither word nor deed, never intimated or asserted his claim for contribution for the partnership debts, which he assumed, and was primarily bound to pay, with the ample assets of a dissolved partnership, of which he was the managing partner and the perceptor of the assets, for which he has never accounted since he took and exercised exclusive control in 1859—thirty-five years before the filing of his bill in this suit.

The bill is defective and demurrable, because it prays for subrogation to the rights of creditors against a co-partner, without a settlement of partnership accounts, and without set-

Opinion.

ting forth or defining the interest of complainant therein; and also because of failure to make the administrator and heirs of the co-partner, E. F. Neel, deceased, parties defendant to the suit. See Sheldon on Subr., sec. 171; 3 Pomeroy Equity, 1419 and note; 5 S. E. Rep., 701; Calvert on Parties, 261; 79 Va., 671; 13 Va. L. J., 524.

The bill was properly dismissed withal, because the evidence fails utterly to establish the merit of the complainant's claim.

For the foregoing reasons we are of opinion to affirm the decree of the circuit court of Bland county appealed from, in which we find no error.

DEGREE AFFIRMED.

Richmond.

VIRGINIA FIRE & MARINE INSURANCE CO. v. THOMAS.

GEORGIA HOME INSURANCE CO. v. SAME.

WESTERN ASSURANCE CO. v. SAME.

MOROTOCK INSURANCE CO. v. SAME.

SAME v. SAME.

MARCH 29th, 1894.

1. *POLICY OF INSURANCE—Conditions—Construction.*—It is now well settled that where two constructions may be placed on language of policy, the one most favorable to the insured is to be adopted, and in case of doubt, the terms are to be construed most strongly against the insurer.
2. *IDEM—Change of title—Case at bar.*—Clause avoiding policy if there should be any change in title or interest of assured unless company was notified in writing, where one of a firm assured, was a married woman whose husband managed her interest, and she died, bequeathing her property to her husband, remainder to her son, and the business was conducted as before until the fire. **HELD:** No such change as avoided the policy.
3. *IDEM—Tin shop—Manufacturing.*—A policy insuring a tin shop, though containing a provision against a manufacturing establishment, yet allows making tin cans and other such work as is usually done in such shops.

Error to five judgments of the circuit court of Culpeper county, rendered October 24, 1893, in the actions wherein W. A. Thomas, surviving partner of himself and Mrs. Ellen S. Stringfellow, late partners in the name of W. A. Thomas & Co., was plaintiff, and the Virginia Fire and Marine Insurance

Statement—Opinion.

Company was defendant, and in same against Georgia Home Insurance Company, and in same against Western Assurance Company, and in two actions wherein same was plaintiff and the Morotock Insurance Company was defendant. In each of these actions the facts and the defences were the same and the judgments were the same in favor of the said plaintiff, and the defendants, respectively, obtained writs of error and *supersedeas* thereto. Opinion states the case.

W. W. & B. T. Crump, for plaintiff in error in first case.

G. D. Gray and *Hill & Jeffries*, for plaintiffs in error in the other cases.

Rixey & Barbour and *J. C. Gibson*, for defendant in error.

LACY, J., delivered the opinion of the court.

The first styled action is upon a policy of insurance, trespass on the case in *assumpsit* for \$3,250 for a loss incurred by fire. The defence is that no such contract was made as that sued upon; fraud in the procurement of the fire by which the property was burned; no effort made to save the property by the plaintiff, and the efforts of others prevented by the false alarm of danger made by the plaintiff; increase of risk after the insurance by keeping gunpowder, and the building used for manufacturing purposes; the loss claimed greater than the interest of the assured; false estimates of the value of the property furnished by the assured; misrepresentations and concealment of material facts in reference to the value of the property and the interest of the assured, made in the application for insurance; no sufficient proofs furnished, as required by the policy; no proofs of loss furnished by the plaintiff; change of interest, title, possession, and occupancy, after the policy issued, without the consent of the defendant indorsed on the policy, as re-

Opinion.

quired thereby; want of interest of the plaintiff in the property; other contracts of insurance procured without the consent of the company endorsed on the policy, as required thereby; misrepresentation in the proofs of loss in reference to the value of, title to, interest in, and ownership of the property destroyed, and as to the origin of the fire; running the manufacturing department at night, without the consent of the defendant endorsed on the policy; plaintiff not sole, absolute, and unconditional owner of the property insured, and destroyed by fire; failure of the plaintiff to comply with each and every one of the conditions precedent set forth in the policy of insurance sued on.

The policy was issued to W. A. Thomas & Co., a mercantile firm doing a tinning business in the town of Culpeper. This firm was composed of the said W. A. Thomas and one Mrs. Ellen F. Stringfellow, a married woman, whose husband, George F. Stringfellow, was, by the agreement between the parties forming the co-partnership, to act for her as her agent under the contract, and render services in the business as occasion might require. The insurance company was represented by local general agents stationed at Culpeper. The insurance was procured by these agents, who were familiar with the business, and well acquainted with the parties concerned. The business insured was a general tin, tinning, and stove business. The fire occurred late in the night. The defendant in error, W. A. Thomas, surviving partner, resided in the town, and was at work late at night in the place of business, and had shut up and retired to bed at his home in the town some hours before the fire occurred. When called up, he went to the store, where a large crowd was already assembled, and attempted to enter the front door, but retired before the smoke and fire. Subsequently he opened a window, and went in and got his books out of the safe, and saved them, it is said, at a great risk to himself. A cry of gunpowder being raised (it does not appear by whom), parties whose property adjoined procured axes and broke into the hardware department, and

Opinion.

brought the gunpowder out. An effort is made, on the cross-examination of Thomas, to indicate the grounds of suspicion of criminal conduct on his part in the fraudulent procurement of the fire. He was asked if he did not say "all right" when first informed of the fire; if he did not do an unusual and suspicious thing in being down there until 9 or 10 o'clock that night, with his furnaces running; and if that night, or that week at least, was not the beginning of such night work; and if two of his insurance policies did not expire next day at 12 M.; and if he was not greatly pressed just then to meet money demands pressing in on him in the shape of drafts, orders, and demands for liquidation of unpaid bills. But these things were not established to the satisfaction of the court and jury, and upon the demurrer to the evidence the jury fixed the recovery subject to the judgment of the court, which was rendered for the plaintiff.

The chief defence, and most relied on, is that there was a "change of interest, title, possession, and occupancy, after the policy issued, without the consent of the defendant indorsed on the policy." It appears that the firm of W. A. Thomas & Co. had continued to run the business as before until the fire; and it is not contended that there was any sale or transfer making any change in the ownership or in the parties in possession. But the circumstance to which we are pointed to sustain this contention is that Mrs. Stringfellow died before the fire occurred, in the month of March of that year; and by will left her property for life to Mr. George F. Stringfellow, her husband, charged with the support of her infant child, and, after his death, to the child, providing, however, that he should continue the business as heretofore, as he might deem best; and he had continued to do this, as we have said, and W. A. Thomas & Co. continued the business as it was before, except additional investments in stock and merchandise, as their business views suggested; and there was no actual change in the personel of the force at work and controlling the business, in

Opinion.

possession and occupancy. The change in title caused by the death of Mrs. Stringfellow is what is relied on under this assignment to defeat this recovery; and to decide this we must construe the language of the policy under which this claim is set up, which is as follows: "If there be any change in the title or interest of the assured in or to the property in any way, or by sale or mortgage or other incumbrances, or if the title or interest of the assured is less than an entire, absolute, unconditional, unincumbered, fee simple ownership, unless, in last event, notice *thereof before loss or damage be given in writing by the assured to the company*, and it accept the same in writing herein." The policy in question must be construed according to its terms, and the evident intent of the parties is to be gathered from the language used; and the court cannot extend the risk beyond what is fairly within the terms of the policy. New conditions cannot be added by the court, but the rights of the parties must stand upon the contract as made. It is to be construed as a whole; not literally nor severely as to either side, but accurately, so as to carry into effect the real purpose and understanding of the parties. But all conditions involving forfeitures, as well as all exemptions, will be construed strictly, and most favorably to the assured—that is, most strongly against the party for whose benefit they are inserted—that is, that such contracts are to be construed as other contracts are construed, and that the exceptions contained in them as provisos shall be construed most strongly against the parties for whose benefit they are inserted. Its language is to receive a reasonable interpretation. Its intent and substance, as derived from the language used, should be regarded. Full legal effect should always be given to it, for the purpose of guarding the company against fraud and imposture. Beyond this it has been said we would be sacrificing substance to form—following words rather than ideas. And, in a case where it can be fairly claimed that two constructions can be placed upon the language used in the policy, it is now well settled that the one

Opinion.

is to be adopted which is most favorable to the insured; and in case of doubt as to the meaning of terms employed by an insurance company they are to be construed most strongly against the insurer.

These general principles, the result of the decided cases, and to be found in the text-books on the subject, being borne in mind, we will briefly consider the clause in question. The insertion is intended to protect the company against unknown risks. The contract of insurance is like other contracts made between known and contracting parties. The contract being one of hazard, and largely of trust and confidence, the person contracted with is deemed of such vital importance that it is expressly provided that the same shall not be assigned without the consent of the company. The person, and all that is involved in the person, his estimated character and known habits, may affect the risk in no small degree, and a stranger is not to be brought in without the consent of all parties. The interest must remain entire and absolute, or the safeguards arising from the ownership and uninsured interest may be broken down. In this case there has been no sale or transfer, or change in the persons in possession. Mrs. Stringfellow, one of the partners, died, and the business, by operation of law, passed to one surviving partner for the settlement of the business of the concern. By the testator's direction, and the consent of all parties interested in the business, the affairs went on, buying and selling as before. It is conceded that if the fire had occurred the next day after the death of the deceased partner, it would not have impaired the policy; and the continuance of the business for several months does not alter the question, as there was no objection, but a positive approval, on the part of the company, by a renewal under these precise circumstances. We are not without the aid of judicial construction and decision upon this question. In the late case of *Va. F. & M. Insurance Co. v. Vaughan*, 88 Va., 835, the question arose where one partner sold out to the other; and it was held, by the weight

Opinion.

of authority and the better reason, not to violate the provision as to change of title or possession, and not to avoid the policy. See that case and the authorities cited, where this clause was held to mean the transfer by the insured to third persons. If, after the insurance is obtained and the risk assumed, the title to the property insured is transferred or changed without the permission of the insurer, it will avoid the policy. "But if the change be a mere succession of the widow and heirs of the assured, who resided in the house at the time of his death, this is not such a change or transfer of the title as avoids the policy." *Ga. H. Insurance Co. v. Kinnier's adm'r*, 28 Gratt., 99.

This is the main question in the case, but there are others which appear to be relied on also. It is claimed that the company insured a tin shop, and the policy contained a provision against a manufacturing establishment, and that the making of tin cans and soldering strips of tin for roofing to be placed upon houses was a violation of the policies. This would be to stick in the bark, indeed. The obvious daily work of the tin shop, patent to everyday observation, was the business insured. To hold that the work of this sort violated the clause in question would not be to effectuate the contract of parties, but to circumvent it. There are other questions still which have been mentioned, which appear to have been rightly decided by the trial court. The question of fraud and deceitful conduct was left to the jury, and by them decided, and we perceive no evidence in the record to sustain these charges. Upon the whole case, we are of opinion to affirm the judgment complained of, rendered herein by the circuit court of Culpeper county.

In the other four cases the property insured was the same as that in the first, the facts were the same, the defences the same, and the results the same, judgments being for the plaintiff in each case, which judgments are all affirmed.

JUDGMENTS AFFIRMED.

Richmond.

NORFOLK & WESTERN R. R. Co. v. PHELPS.

MARCH 29th, 1894.

RAILROADS—*Employees—Negligence of superior—Case at bar.*—A railroad company held liable for an injury to an engine hostler caused by the negligence of his superior, the yardmaster, in sending him forward with the engine on a track upon which the yardmaster had thrown some box cars in charge of a brakeman, although the negligence of such brakeman (his fellow servant) in bringing the cars too close to a switch on which such hostler is directed by his said superior to take the engine, contributed to the injury.

Error from judgment of circuit court of city of Lynchburg, rendered at its November term, 1893, in an action of trespass on the case for personal injuries wherein Archie B. Phelps was plaintiff and the Norfolk and Western Railroad Company was defendant. The judgment being adverse to the company it brought the case here on error. Opinion states the case.

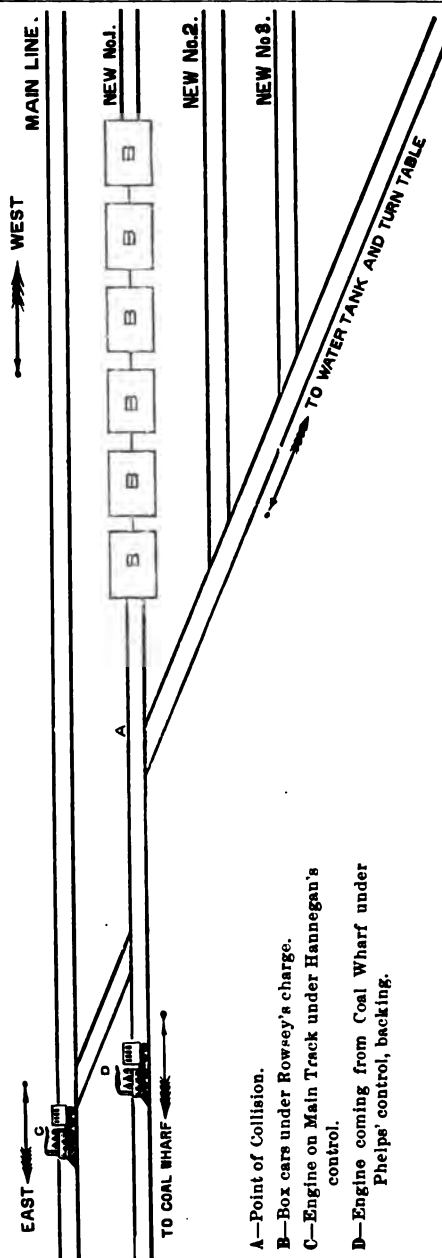
Kirkpatrick & Blackford, for plaintiff in error.

F. P. Christian and *John L. Lee*, for defendant in error.

LACY, J., delivered the opinion of the court.

The action was for injuries to the person, by Archie B. Phelps against the plaintiff in error company. The injuries were received by the plaintiff, Phelps, while in the discharge of his duty as "hostler"; that is, an employee who receives and takes

Opinion.



A—Point of Collision.

B—Box cars under Rowsey's charge.

C—Engine on Main Track under Hannegan's control.

D—Engine coming from Coal Wharf under Phelps' control, backing.

Opinion.

charge of an engine when it comes in the yard after a run on the road; that is, an engine-man on an engine in the yard, without a train. His duties are to relieve the engine-man and fireman on the engine when it arrives bringing a train in, or coming without a train. He cleans and takes the engine on one of the yard tracks to the coal wharf, supplies it with coal, runs it down to another point, called the "water tank," and supplies it with water, oils it, and brings it to the point where it is needed for another trip, or disposes of it as his directions are. Usually, while he is doing this, and in the present case it was so, the yardmaster with the yard engine is shifting the cars and making up the train to go out. About 10 o'clock of the night of June —, 1893, a train arrived from the west at Island yard, in Lynchburg. Coming from the west, as is indicated on the plat or diagram appended, on the track marked "Main Line," and near to and a little west of the words "Main Line," Yardmaster Hannagan took charge of the train, and with his crew, one of which was the plaintiff, Phelps, he detached the road engine, and put it in charge of Phelps, the "hostler," and sent him down a parallel track, shown on the diagram as "New No. 1," to the coal wharf, situated further east on the extension eastward of New No. 1. He then threw or kicked ten box cars down New No. 1 in the same direction as Phelps had gone, while he himself, with the yard engine, marked "C," proceeded likewise in the same direction on the main line, which ran parallel with the track New No. 1. As he passed by the ten box cars, six of which are shown on the diagram, marked "B," he said to a brakeman belonging to his yard crew, named Rowsey, in whose charge he had placed the ten drifting cars, "Look out for them, Bill," and moved on east, so as to pass a short lead from the main line to track No. 1 New, at the point on the diagram where the engine, C, is marked, go into the New No. 1 track, and take charge again of the ten drifting cars in front of them. As he stood with his engine waiting for the drifting cars to come on down New

Opinion.

No. 1 to the short lead, he noticed Phelps coming slowly back, and waiting, for safety, east of this short lead, until these cars had passed out of his way, so that he, Phelps, might go on to a point further west, marked "A" on the diagram, where he was to take the track marked "To water tank and turn table," at A, and where he feared collision or obstruction with the ten drifting cars. All was darkness, but he knew these cars had been thrown into track New No. 1, and were in his front; and if they reached the point A, where the water tank lead branched off from New No. 1, before he did, they must obstruct his way; and as they were drifting without an engine, in the care of one man, and in the darkness, he hesitated to go further, as there was danger of collision until they had again come under control of the yard engine under the care of Hannagan, the yardmaster. Hannagan had thrown the switch at the short lead, to let himself into the short lead, and was about to throw the switch which would let him with his engine into New No. 1 at X. He directed Phelps to go on up there—go on back out of the way. Phelps was running tender in front. He (Phelps) had checked up because of the darkness and the open tracks in front of him, on one of which he knew a train of ten cars was running down towards him; but Hannagan, who was his superior, came down and said, "And what are you waiting for?" Phelps replied, "Tom, I am afraid they ain't clear up there." Hannagan said, "Go on up there," and Phelps moved on. Seeing Hannagan coming on with his yard engine, he thought it all right. As he reached the point A, intersection of New No. 1 and the tank lead, the switch was set right for him, showing him the white light, and against Rowsey, with his ten cars; so he passed the switch with his engine. But just then Rowsey had come down with his box cars, and the switch showed him the red light, and he probably did not intend to attempt to come through and force the switch; but he had not quite halted, and Hannagan had not yet thrown the switch for him, and so he came so near to the switch that his leading car

Opinion.

struck the cab, and knocked off that side and some of the braces, and caused the hot water to come out and scald and greatly injure Phelps. The tracks running out of each other had not widened enough to allow the Rowsey cars to come so close to the switch. In other words, he was within what is called the "danger post" at switches ordinarily; but here there were no such guards against this species of collision. Phelps sued for his injuries and seeks to hold the company liable in damages.

If the injury was caused by negligence, whose was it? Hannagan's, beyond a doubt. He did not err on the side of safety, but recklessly, in his unexplained haste, ordered Phelps forward, and undertook to know that there was no danger, perhaps because he had not yet thrown the switch for Rowsey. He did not know how close Rowsey would come to that switch in the darkness, especially as there were no danger posts there, or, if there, invisible in the darkness. He knew that Rowsey had only a limited control of the cars he was on—he could stop them with the brake, but he could not move them back at all, nor stop them very promptly either. He was there representing the company, and he doubtless knew the grave responsibilities resting on him—that Rowsey was, in obedience to his orders, coming that way—and he sent Phelps forward with an order he was bound to obey. He knew that at a switch the two tracks for a short space are intermingled, and that there was danger of collision in passing, if the box cars should come too close, and that the switch could not prevent them from coming too close for safety, as it did not in this case. Rowsey had not violated the switch, and yet he had reached the danger point. It cannot be said that Rowsey was guilty of any negligence. He had been told to drop them along down slowly, and Hannagan would come in and get them; and he doubtless was expecting Hannagan to throw the switch and let him out, or come in and get him; and he was going very slowly—barely moving. But, if he was guilty of negligence, it does not alter the

Opinion.

case. It was the negligence of the company, through its agent and representative on the scene, Hannagan, and Phelps was guilty of no negligence which contributed to the accident; and, although Rowsey had been guilty of concurring negligence with Hannagan, that could not be charged to Phelps, although his fellow servant. The action of Hannagan in sending Phelps forward, under the circumstances, was an unnecessary exposure of the employee to danger, by which he was injured without fault on his part, and the company is liable to respond in damages. See *Railroad Co. v. Brown*, 89 Va., 753, and cases cited. The case having been decided in the circuit court in accordance with these views, the same must be affirmed.

JUDGMENT AFFIRMED.

Richmond.

COMMONWEALTH v. BROWN.

MARCH 29th, 1894.

1. **CRIMINAL PROCEEDINGS—Homicide—Witness.**—Where on trial of one of two persons jointly indicted for murder and electing to be tried separately, the commonwealth declines to call the other defendant as its witness, and at the suggestion of prisoner's attorney, the court calls him, and he is examined first by the court, then by commonwealth's attorney, and lastly by prisoner's attorney : *held*, no error.
2. **IDEM—Conduct of jury—Absence of accused.**—A mere casual visit to scene of homicide by jury during recess whilst taking exercise under custody of officer in charge, in prisoner's absence, when there is no proof of prejudice, or of conversation regarding the scene, or of any influence on the jury thereby : *held*, no ground for setting aside the verdict.
3. **IDEM—Exclusion of witness.**—Where after order of trial court that the witnesses be examined out of the hearing of each other, one not summoned, but present as a spectator, has heard part of the evidence, was called as witness for commonwealth : *held*, no ground for his exclusion. *Hey's Case*, 32 Gratt., 946.
4. **IDEM—Evidence of another offence.**—Where on trial for murder prisoner had been, without objection, proven to have confessed that on night of homicide certain goods had been stolen, and a witness was allowed to testify that those goods were found in prisoner's house when he was arrested for the homicide : *held*, as prisoner was not prejudiced by the testimony, its admission, though irregular, was not a reversible error.
5. **IDEM—Evidence at examination.**—Where notes of evidence at prisoner's examination before the magistrate, were taken by private stenographer of commonwealth's attorney at his own expense and for his own use : *held*, prisoner has no right to have those notes.
6. **IDEM—Malice aforethought—Instructions.**—To constitute murder, the killing must be predetermined, yet the design to kill need not have existed for any particular length of time and may be formed at the moment of committing the act, and an instruction on a murder trial, that it is not

necessary that the design of killing should have existed "for any length of time": *held*, not misleading as being equivalent to telling the jury that a killing on sudden impulse is murder.

7. *IDEM—Deadly weapons.*—Malice may be presumed from the use of a deadly weapon in the previous possession of the slayer.
8. *IDEM—Principal in second degree.*—An accused may be guilty of murder in the second degree, though the fatal shot was fired by another, if the latter was engaged jointly with accused in a felonious act and fired the shot in attempting to accomplish their joint escape, the accused being present aiding and abetting the one who fired it.
9. *IDEM—New trial—Bill of exceptions.*—Where neither the facts nor the evidence is certified in the record, this court cannot review a decision of the trial court overruling a motion for a new trial.

Error to judgment of corporation court of the city of Norfolk, pronounced June 1, 1893, sentencing the plaintiff in error, Madison Brown, to be hanged for the murder of John Dollard, in that city, on the 7th day of April, 1893. Opinion states the case.

W. L. Williams, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LEWIS, P., delivered the opinion of the court.

The prisoner was jointly indicted with one Boush for the murder of John Dollard. Upon their arraignment the defendants elected to be tried separately, and the first question arising upon the trial of the plaintiff in error, Brown, relates to the action of the court in calling as a witness the said Boush. It appears from the bill of exceptions that the attorney for the commonwealth declined to call Boush as a witness for the prosecution, and that he was called by the court at the suggestion of his own attorney. It also appears that, upon being called, he was examined first by the court, then by the attorney for the commonwealth, and afterwards by the counsel for the prisoner. Whether the examination by the prisoner's

Opinion.

counsel was a waiver of the previous objection to Boush's being called as a witness, it is unnecessary to decide, because in any event the action of the court was the valid exercise of a discretion to call any witness who was present at the transaction, according to the rule recognized in *Hill's Case*, 88 Va., 639.

The next objection is founded upon the alleged misconduct of the jury in visiting, during the trial, without the consent and in the absence of the prisoner, the scene of the homicide. Upon this point the facts appear from the affidavit of the officer in charge of the jury, who testified that during a recess of the court the jury requested him to be allowed to take a walk up to James and Queen streets; that he at first demurred, as the weather was threatening, but that they insisted on going, and that they all walked up to the corner of Queen and James streets, he with them; that he was behind, and in no way directing or suggesting their movements; that when they got to the corner of the said streets some of the jurors looked into the alley where the alleged murder was committed, and looked at the premises; that as soon as he came up he asked them to come out of the lane, and that they did so. He said further that they looked at the premises not more than a minute or two, and that no one spoke to them during their walk or at the premises.

In the argument at the bar a number of decisions from other States were cited to show that it is error for a view to be had in a felony case in the absence of the accused. The decisions on the subject seem to be founded upon statutes, and are by no means harmonious. On the one side it is held that the accused must be personally present, because no evidence can be taken in his absence; while, on the other, it is held that the purpose of the view is not to serve as evidence for the jury, but to enable the jury better to understand the evidence offered in court. 12 Am. & Eng. Ency. of Law, 369, and cases cited.

We need not, however, go into this question in the present

Opinion.

case, because upon the facts stated the objection cannot be sustained. The case is very similar to the well considered case of *State v. Brown*, 64 Mo., 367, in which case the facts were these: The jury during the trial went on, and looked at, the ground where the deceased was killed; but the witness could not state that they were looking at the ground with a view of understanding how the killing was done, nor was it shown that they said anything about it, or that they conversed among themselves in regard to the ground. The Supreme Court of Missouri held that this was not misconduct on the part of the jury, and added: "If, on such grounds as are here relied upon, a verdict must be set aside, then, when the offence is charged to have been committed at a county seat, generally a small village, over the whole extent of which one has a view from the court-house window, and in which not unfrequently the crimes for which persons are prosecuted are committed, the jury would have to be consigned to a dungeon to consider of their verdict, lest they might accidentally see some locality mentioned in the testimony. The place where the killing occurred in this case was not in doubt. There was no conflict of evidence on that subject; no question whether any witness who testified was in a position to see what he related, and no possibility that the defendant could have been prejudiced by the conduct of the jury."

Wharton lays it down that a mere casual visit by the jury to the scene of the *res gestæ*, and without influence on the jury, as where the jury, when taking exercise under the custody of an officer, walk by such scene, is no ground for setting aside a verdict; and the proposition is fully supported by authority. Whart. Crim. Pl. & Pr. (9th ed.), sec. 834.

We see no good ground for applying a different rule in the present case. The visit of the jury to the scene of the homicide was merely casual, and could have had no influence upon them. There was no conversation between them regarding the premises, nor, for aught that is shown by the record, was there any conflict of evidence upon any point in the case. How,

Opinion.

then, it was possible for the accused to have been prejudiced by the action of the jury, it is not easy to see.

The next assignment of error is based upon the bill of exceptions taken by the prisoner to the action of the court in allowing the witness, Dollard, to testify for the commonwealth. Dollard had not been summoned as a witness, but was present as a spectator. The point of the prisoner's objection to his testifying was that he had heard a part of the evidence, and ought, therefore, to be excluded, as the court had previously ordered that the witnesses be examined out of the hearing of each other. This was no ground for excluding the witness, nor would it have been ground for excluding him even if he had been summoned as a witness before the order was made. In *Hey's Case*, 32 Gratt., 946, it was said that while a witness who disobeys such an order is liable to punishment for contempt, he is not for that reason to be excluded, but that the practice is to allow him to be examined, subject to observation on his conduct in disobeying the order; and it is now well settled by the English decisions, that the judge, in such a case, has no right to exclude the witness, though at one time it was held to be in his discretion to do so.

Nor was there reversible error in admitting the evidence of the witness, Holland, which is the subject of another bill of exceptions. The witness merely testified that certain goods which were found in the house of the prisoner, when he was arrested for the homicide in question, belonged to him (Holland), and that they were stolen from his store the night of the alleged murder. The prisoner was not prejudiced by the evidence, although not strictly admissible, because he had previously stated, as a part of his confession, which was proven without objection, that the goods were stolen from the witness' store on the night of the killing. Neither the evidence nor the facts are certified, and there is nothing in the bill of exceptions to warrant a reversal of the judgment because of the admission of the evidence in question.

Opinion.

The refusal of the trial judge to compel the attorney for the commonwealth to furnish the prisoner with certain stenographic notes of the evidence taken before the examining magistrate is also assigned as error. It appears that the notes were taken at the instance of the attorney for the commonwealth, for his own use, and at his own expense, by a private stenographer, and the prisoner, therefore, had no more right to them than to any other private property of the prosecuting attorney.

After the evidence had been closed the court instructed the jury, among other things, that it was not necessary that the design to kill should have existed "for any length of time." This, it is insisted, was tantamount to telling the jury that a killing on sudden impulse is murder. We do not think so. The idea sought to be conveyed to the jury evidently was that the design to kill need not have existed for any considerable time; for it was immediately added that "it will be sufficient if the jury believe from the evidence that at the moment of firing the shot the accused intended to kill or to do great bodily harm," etc., which is in accordance with the established rule of criminal law. In *McDaniel's Case*, 77 Va., 281, it was held, in conformity with numerous previous decisions, that while, to constitute murder, the killing must be pre-determined, yet the design to kill need not have existed for any particular length of time; that it may be formed at the moment of the commission of the act.

In the present case the court substantially repeated to the jury the instruction just commented on, with the additional remark, that malice may be presumed from the use of a deadly weapon in the previous possession of the slayer, which is entirely correct. *Hill's Case*, 2 Gratt., 594; *Hull's Case*, 89 Va., 171.

The next bill of exceptions states that the prisoner moved the court to instruct the jury as follows: "The court instructs the jury that unless they believe from the evidence, beyond a

Opinion.

reasonable doubt, that the shot which killed Dollard was fired by Madison Brown (the prisoner), with the wilful, deliberate, and premeditated design of killing, then the offence would not be murder in the first degree." To this the court added: "Unless they further believe that, though the shot was fired by another, such other was engaged jointly with the prisoner in the commission of a felonious act; that it was fired in the attempt to accomplish their common escape; and that the prisoner was present aiding and abetting the person who fired the shot"; and as thus modified the instruction was given.

As neither the evidence nor the facts are certified, we do not see very clearly the relevancy of the instruction; but as an abstract proposition the instruction is right. An eminent writer on criminal law, after observing that to render a person a principal in the second degree his presence at the fact need not be a strict actual immediate presence, such as would make him an eye or ear witness of what passes, but may be a constructive presence, adds: "So that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the fact, others to watch at proper distances and stations to prevent surprise, or to favor, if need be, the escape of those who are more immediately engaged; they are all, provided the fact be committed, in the eye of the law, present at it," and therefore principals. 1 Russ., Crimes, 22.

The next point, viz: that the corporation court postponed the execution of its sentence more than thirty days after the then next term of this court, contrary to section 4051 of the Code, need not be considered, as it is not a practical question in the case.

There was also a motion for a new trial, which was overruled; but as the record embodies neither the facts nor the evidence, we must assume that the ruling of the court in this particular was right.

Opinion.

The overruling of the motion in arrest of judgment is the subject of the next and last assignment of error; but no reasons are urged in support of the objection, and we find nothing in the record to support it.

There is no error in the judgment to the prejudice of the prisoner, and the same must be affirmed.

JUDGMENT AFFIRMED.

Richmond.

EX PARTE BASSITT.

MARCH 29th, 1894.

CONSTITUTION—*Appointment of justices.*—Code, § 97, authorizing county courts to appoint additional justices to the number specified in the constitution when the public service requires it: *held*, not violative of sections 2 and 4, article 7 of the constitution, and not an unwarranted delegation of legislative power.

Petition of John Bassitt in the original jurisdiction of the court for a writ of *habeas corpus*. Opinion states the case.

Beveridge & Bristow, for petitioner.

Attorney-General R. Taylor Scott, for respondent.

LEWIS, P., delivered the opinion of the court.

This is a petition for a writ of *habeas corpus*. The petitioner, John Bassitt, alleges that he is illegally detained in the jail of Elizabeth City county by virtue of a *mittimus* issued by S. O. Houching, a pretended justice of the peace of Chesapeake magisterial district, in said county, on the 2d day of November, 1893; that on that day there were three duly elected, qualified and acting justices of the peace in and for said district, viz: W. H. Power, Arthur Boykin, and R. L. Thornton; and that the said Houchins was a mere usurper in the office of justice of the peace, whose acts were without any validity whatever. It appears from an exhibit filed with the petition that Houchins

Opinion.

was acting as a justice, on the occasion in question, under an appointment of the county court of the said county, made on the 16th of October, 1893, of which the following is a copy :

"It is ordered to be entered of record that this court is of opinion that the public service requires one justice of the peace in addition to those specified in the constitution, in Chesapeake magisterial district, and that notice thereof shall be published as the law requires. And the court doth appoint Samuel O. Houchins a justice of the peace for said district, to serve until such additional officer shall be elected and qualify, and thereupon the said Samuel O. Houchins appeared in court and qualified to his office by taking and subscribing the oath required by law."

This order and appointment were made under the act of March 27, 1876, now carried into section 97 of the Code, which enacts that "whenever a county court shall be of opinion that the public service requires a greater number of justices or constables in any district than those specified in the constitution, and shall so enter of record and designate the number of such additional officers, notice thereof shall be published in such district, and at the next succeeding general election for district officers, such additional officers shall be elected in the mode prescribed for the election of district officers, and continue to be elected at each succeeding general election of district officers until otherwise ordered by the court," etc.

The same section also authorizes the court to appoint officers to serve until such additional officers are elected and qualified.

The petitioner's contention is that this enactment is unconstitutional, and that, therefore, Houchins is not an officer, either *de jure* or *de facto*. If the statute be unconstitutional, then, undoubtedly, no office was created by it, or by anything that was done under it, and Houchins is merely a usurper, to whose acts no validity can be attached; for, as was decided in *Norton v. Shelby County*, 118 U. S., 425, there can be no of-

Opinion.

ficer, either *de jure* or *de facto*, if there be no office to fill. This is not disputed; but is the statute unconstitutional?

The second section of the seventh article of the constitution, under the head of "County Organization," ordains as follows: "Each county of the State shall be divided into so many compactly located magisterial districts as may be deemed necessary, not less than three: provided, that after these have been formed no additional districts shall be made containing less than thirty square miles. * * * In each district there shall be elected one supervisor, three justices of the peace, one constable, and one overseer of the poor, who shall hold their respective offices for the term of two years." "But nothing in this article," says the fourth section, "shall be construed as prohibiting the general assembly from providing by law for any additional officers in any city or county." Code, p. 44.

Authority is thus impliedly conferred upon the legislature to provide by law for additional officers; and the act of March 27, 1876, was passed in the exercise of this power. The constitution, it will be observed, does not prescribe the manner in which additional officers shall be provided for, but leaves that to the discretion of the legislature. The provision simply is, in effect, that such officers may be provided for "by law."

It is contended that the act before mentioned is an unwarranted delegation of legislative power to the county courts, and in violation of the second article of the constitution, which declares that "the legislative, executive, and judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to either of the others." But we do not perceive the force or propriety of this position. There is here no delegation of legislative power, but the county courts are merely empowered to declare the event, so to speak, upon which the act is to take effect within their respective counties.

Judge Cooley lays it down, that while the power to make laws cannot be delegated, yet it is not always essential that a

Opinion.

legislative act should be a completed statute, which must in any event take effect as law, at the time it leaves the hands of the legislative department. A statute, he says, may be *conditional*, and its taking effect may be made to depend upon some subsequent event; and affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not at their option; and for this he cites, among other cases, *Brig Aurora v. United States*, 7 Cranch, 382, and *Bull v. Read*, 13 Gratt., 78. In the first of these cases it was held that Congress may make the revival of a law conditional upon a fact then contingent, and empower the president to declare by his proclamation that such fact has occurred, and the law is revived. And in *Bull v. Read* an act providing for the establishment of a system of free schools in a particular magisterial district of Accomac county, subject to the approval of the voters of the district, was held valid, although assailed as being an illegal delegation of legislative power. See, also, *Savage's Case*, 84 Va., 619. "For the like reasons," says Judge Cooley, "the question whether a county or township shall be divided and a new one formed, or two townships or school districts formerly one be reunited, or a county seat located at a particular place, or after its location removed elsewhere, or the municipality contract particular debts, or engage in a particular improvement, is always a question which may with propriety be referred to the voters of the municipality for decision." Cooley, Const. Lim., 119.

The same principle applies to the present case; for if it be competent for the legislature to submit a matter of local concern to the decision of the voters of the municipality, it is equally competent for it to submit a similar question to the decision or approval of the county court.

Our conclusion, therefore, is that the act in question is constitutional and valid, and that the petitioner must be remanded to the custody of the sheriff of Elizabeth City county.

WRIT DENIED.

Wgtherville.

MOORE ET AL. V. BUTLER ET AL.

JUNE 14th, 1894.

1. ANTENUPTIAL SETTLEMENTS.—Prior to May 1, 1888, deed from a man to his intended wife in consideration of marriage, was valid as against his creditors in the absence of fraudulent intent on her part. *Herring v. Wickham*, 29 Gratt., 628.
2. *IDEM—Evidence—Case at bar.*—In suit by creditors to annul deed made before May 1, 1888, in consideration of marriage by a man to his intended wife, it appeared that grantor was at its date insolvent, and had recently bought considerable property on credit, and the deed would leave his creditors unpaid; that before the marriage notice was served on her of such suspicious circumstances; that the commissioner, who heard the witnesses, reported that there was no proof of her fraudulent participation, and the report was confirmed: *held*, the deed must be allowed to stand.

Appeal from decree of circuit court of Hanover county, rendered October 26, 1891, in a chancery cause wherein J. S. Butler and others were complainants and L. A. Butler and others were defendants. The decree being adverse to the complainants, they appealed. Opinion states the case.

George T. Haw, Hill Montague, and James Lyons, for appellants.

Cardwell & Cardwell, for appellees.

LACY, J., delivered the opinion of the court.

Opinion.

The controversy here is over certain trust deeds made by the appellees, J. F. Moore and L. A. Butler, some of the trusts were to secure certain valid debts, so held by the decree of the circuit court of Hanover, so conceded here now to be *bona fide* and valid.

But these parties, J. F. Moore and L. A. Butler, before the Code of Virginia, 1887, went into operation, made antenuptial deeds, conveying certain property, subject to the above mentioned deeds, to their prospective wives in consideration of marriage. These deeds were executed and recorded, and the marriages took place. Whereupon J. S. Moore, the appellant, and Wingo, Ellett & Crump, all merchants of Richmond city, brought their suits to annul these marriage deeds for fraudulent intent in which the expectant wife is alleged to have fully participated.

The case of *Herring v. Wickham*, 29 Gratt., 628, is conceded, the transactions being before the Code of 1887 went into effect, also *Clay v. Walters*, 79 Va., 92, when the wife expectant was served with notice of the contention of the creditors, that the deed was with fraudulent intent. The only question in dispute here is one of fact. The law being conceded that the deed is good if there was no fraudulent intent on the part of the grantees. And also that the deed is void for fraudulent intent, if such existed on the part of the grantor in each case, and if the fraudulent intent was participated in on the part of the grantee in each deed.

But the grantee in each deed denies all fraudulent intent, and disclaims all knowledge of fraudulent intent on the part of the grantor if such should be found to exist. The circuit court referred the disputed question to a commissioner to take evidence and make report as to these matters.

The evidence was taken and reported in the form of depositions, and report made that there was no participation in any fraudulent intent on the part of the beneficiaries, and that the deeds were valid and binding. This report the circuit

Opinion.

court confirmed in the decree complained of and appealed from here.

In the answers, the grantees, not under oath, oath being waived in the bills; and the depositions show that in the Butler deed the plaintiffs served notice as in the *Clay v. Walters supra*, on the expecting wife, of suits and the contention of the plaintiffs as to the fraudulent intent of the grantor, and there is evidence of circumstances that may be said to be suspicious in each case. But the commissioner who heard and saw the witnesses testify, and the circuit court which tried the case, decided that there was not sufficient proof of any fraudulent participation on the part of the grantees in the cases. In such case great weight is necessarily given to the decree of the court below, and this court will not reverse except in a case of palpable mistake. *Bowers v. Bowers*, 29 Gratt., 697; *Magarity v. Shipman*, 82 Va., 784; *Porter v. Young*, 85 Va., 49. In this case the evidence cannot be said to be conflicting, the defendants having called no witnesses. But the questions are decided upon the weight of the evidence in the effort to bring home to the wife knowledge of the fraudulent intent of the husband, and collusion therein, and these circumstances are held insufficient to establish any guilty knowledge on the part of the wife. The plaintiffs prove the circumstances of suspicion as to the husband, which are his insolvency and the recent purchase of a good deal of property and goods so short a time before the conveyance of that, and all other property, so as to leave the creditors without payment of any part of their debts, if the deed stands.

But the only evidence which tends to show any knowledge in the grantee of the insolvency and the claim of fraudulent intent by the creditors, is the evidence of the witness Alexander, who served the above mentioned notices on Mrs. Butler before her marriage; when she seemed to be excited and asks the witness, who was the deputy sheriff, what all that meant; when he told her not to mind him, he expected to be married

Opinion.

himself soon, and that he did not think they would amount to anything. He served similar notices on Mrs. Moore, but had no conversation with her at all.

In *Clay v. Walters, supra*, it was held that "it was necessary to show that the intended wife knew of the guilty purposes of her intended husband, if suit existed, and that she participated in the fraudulent intent." That it was necessary to bring home to her actual knowledge of the fraud in contemplation. See *Clay v. Walters, supra*, and what is said on pages 97 and 98 of that case.

We cannot say upon the evidence here that she had knowledge of any fraudulent intention on the part of her husband. She participated in one of the cases in the purchase of house-furnishings by her husband, but she heard him promise to pay for them, and saw him sign a note binding him to pay for them, and there is no proof tending to show that she knew that he could so easily avoid payment and escape from the obligation of his written promise.

We are constrained to affirm the decree of the circuit court in this case, and to hold that there is not sufficient proof of fraudulent intent on the part of the wife, which is done accordingly.

DECREE AFFIRMED.

Wygtheville.

NORFOLK & WESTERN RAILROAD CO. v. WARD.

JUNE 14th, 1894.

1. **EMPLOYEES—Contributory negligence—Obedience to orders.**—Where employee acts in obedience to orders he cannot be deemed guilty of contributory negligence, unless the danger be so glaring that no prudent man would encounter it, even when, like the employee, he was not entirely free to choose.
2. **IDEM—Increased dangers—Liability of employers—Case at bar.**—Defendant had plaintiff employed in making excavations that demanded much caution. "Ground-hog-holes" were dug eighteen inches wide and thirteen feet deep instead of six or eight feet deep as usual, with sides unsupported. "Boss," without examining as to the safety of the work, ordered plaintiff, who was unaware of the increased dangers thereof, to go in and dig the hole deeper. The sides caved in and disabled plaintiff for life: **HELD**, defendant is liable.
3. **IDEM—Knowledge of danger—Burden of proof.**—The burden rests upon employer to prove that employee was aware of the increased dangers growing out of employer's negligence, and not out of the dangers incident to his ordinary employment.

Error to judgment of circuit court of Carroll county, rendered at its November term, 1892, in an action of trespass on the case wherein C. C. Ward was plaintiff and the Norfolk and Western Railroad Company, the plaintiff in error, was defendant. Opinion states the case.

Brown & Moore, for plaintiff in error.

R. C. Jackson and W. D. Tompkins, for defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

This suit is for damages for an injury received by the plaintiff while in the employ of the defendant company grading the track of its road.

After all the evidence had been introduced the court gave four instructions asked for by the plaintiff, which were excepted to by the defendant, and gave six instructions asked for by the defendant, which were excepted to by the plaintiff. The jury found for the plaintiff, and assessed \$1,100 damages.

The defendant moved to set aside the verdict, and for a new trial, on the ground that the verdict is contrary to the evidence and law of the case, which motion the court overruled and entered the judgment complained of, upon the finding of the jury.

The defendant excepted to the action of the court, and the evidence is certified.

The plaintiff in error assigns for error that the judgment is erroneous, in that the court overruled the motion to set aside the verdict of the jury, as contrary to the law and the evidence, and to grant a new trial; and that the instructions given to the jury, on the prayer of the plaintiff, are erroneous.

The appellee, Ward, received severe and permanent injury by the caving in of the side of a chamber, or "ground-hog-hole," as known in the parlance of railroad-track grading, eighteen inches wide, thirteen feet deep, and twelve feet into the mass of impending earth to be excavated and removed, in which he was working in the employ of the defendant company, and into which he was specifically and peremptorily ordered to go and dig and excavate it deeper, after he had dug it, and shoveled out the earth, to even a greater depth than was the customary and prudent depth, by the supervising and authoritative "boss" in charge of the work as the agent of the appellant.

The defendant company claims that the evidence failed to

Opinion.

show any negligence on the part of the company, and that the plaintiff knew, or ought to have known, of the danger of the place and character of the work; and that he assumed the risk incident to his employment.

The evidence is certified, and in reviewing the finding of the jury upon the facts, we are confined to the evidence for the appellee where there is any conflict. Abundant evidence was introduced by the plaintiff (who is appellee here) to show that the place in which he worked, and the method of the work, as ordered and conducted by the defendant, were not reasonably safe, and that the agent of the company in charge of the digging and excavating did not adopt or observe the requisite and usual caution to prevent or guard against the extreme danger of the work into which he specifically and positively ordered the appellee to go, and which, proximately, caused his severe and lasting injury. The soil or earth in which the defendant company was constructing its road-bed was treacherous at this place—rotten and seamy; and the evidence shows that it was known to the company's agent and representative to be dangerous to work in by sinking chambers and undermining and breaking off the forehead or blocked out mass. Their foreman, who ordered the appellee to go back into the hog-hole and sink it to the unusual and dangerous depth of thirteen feet, knew of the risk of the undertaking, and expressed his fear that he would get his men killed in the chambers by the falling in of the sides of the rotten, loose, and seamy earth; and only a day or two before the accident which injured the appellee, one of the chambers near by caved in because of the character of the earth and the unsupported sides of the "hog-hole." After Ward, the appellee, had sunk the chamber in which the accident occurred to the usual depth to which they had been sinking them, he came out to break off the forehead as the usual precaution for safety. Long, the standing boss, was peremptorily ordered by Hanks, the walking and chief boss, without even a look or glance of inspec-

Opinion.

tion by either of them, to send Ward in again to sink the chamber deeper. Long gave the order to Ward as coming from Hanks, which Ward obeyed; and when he had dug and shoveled out the chamber to the depth of thirteen feet, one of the unsupported sides fell in and crushed the appellee under the weight of the fallen mass, causing to him painful and permanent injury. Here is a distinct act of positive negligence and recklessness of the authoritative agent of the defendant company, by which, proximately and directly, a day laborer, who was bound to obey the orders of his superior, was severely injured and disabled for life.

It is argued that the appellee, Ward, must be presumed to have known, and was in duty bound to observe the dangerous character of the work, and therefore he assumed the danger incident to his employment. He swears positively that he did not know of the danger of his situation and surroundings; and the jury found, as a fact, that he was not guilty of contributory negligence in obeying the specific and positive order of his superiors to return into the chamber and sink it deeper. Hanks and Long knew of the danger, and the duty of careful and constant inspection of the situation and progress of the work, to detect and provide against danger and injury to the laborer who was digging and shoveling dirt in this narrow, deep, and dark ditch, was wholly neglected by them to the serious injury of the defendant's employee. An employee assumes such risks as are incident to his employment and do not arise or ensue from the negligence of his employer, or his deputies in authority over him and his work; but the evidence in this case establishes the fact that the accident would not have happened but for the gross recklessness of the defendant company's agent. The usual plan of doing this work had been to sink the chamber six or eight feet, and then "break off" the loosened and undermined forehead or impending mass, before beginning to sink the chamber deeper. Had this been observed in this case there could be but little or no danger of

Opinion.

serious injury, because the walls being low, were not likely to fall; and if they should commence to fall the workmen could save themselves by getting out, which it was impossible for Ward to do in a narrow cell only eighteen inches wide and thirteen feet deep, into which he was ordered to work, and to sink the chamber several feet deeper than was usual; and that, too, in earth more dangerous and treacherous than had been encountered in the work before reaching the cut where the accident and the injury happened.

When the servant shows that his injury was in consequence of an increased risk, and one not ordinarily incident to his employment, but growing out of the master's negligence, the burden of proof is upon the master to show that the servant knew of and understood the increased danger. 40 Michigan, 420-24.

"If he knew, or reasonably ought to have known, the presence of danger to him in the course of his employment of the cattle chute in question, and saw fit, notwithstanding, to continue in his employment, he might be held to answer the extraordinary risk, as well as the ordinary risks of his service. But it appears to us that this consequence of acquiescence ought to rest on positive knowledge of precise dangers assumed—not on vague surmises of possibility of danger." 42 Wisconsin, 583.

If an employee, *without specific command* as to time and manner, uses an obviously defective implement, the defect alike open to the observation and within the comprehension of both employer and employee, both stand upon common ground, and no recovery can be had for a resulting injury to either; but when the servant acts under the orders of his master, and is injured, the rule is different, for then it cannot be said, with any degree of reason, that the master and servant stand on equal footing, even though they have equal knowledge of the danger. The servant occupies a position of subordination and may rely upon the skill and knowledge of his master, and is not free to

Opinion.

act on his own suspicions." *Iron Ship, &c., Works v. Nuttall*, 119 Pa. St., 149; *Shortel v. St. Joseph*, 104 Mo., 114.

"If therefore the master orders the servant into a situation of danger, and he obeys, and is thereby injured, the law will not deny him a remedy against the master on the ground of contributory negligence, unless the danger was so glaring that no prudent man would have entered into it, even when, like the servant, he was not entirely free to choose. The same rule has been applied, and with sound reason, where the person injured was ordered into a service of peculiar danger, such as he did not undertake to perform, by another servant standing towards him in the relation of superior or vice principal; and if he obeys such an order and is injured he may recover damages; the law will not declare his act of obedience negligence *per se*; but will leave it to the jury to say whether he ought to obey or not." Thompson on Negligence, 975. "Where there is any doubt whether the employee was acquainted, or ought to have been acquainted, with the risk, the determination of the question is necessarily with the jury." *Runnell v. Dilworth*, 111 Pa. St., 343. The foregoing principles of law are directly applicable to the facts of this case. Of the instructions given by the court, it is enough to say that they correctly state the law, and there is nothing in them of which the appellant can complain. Our judgment is to affirm the judgment of the circuit court of Carroll county.

JUDGMENT AFFIRMED.

NOTE BY REPORTER.—As to obedience to orders affecting contributory negligence, see note to *Orman v. Mannix*, (Colo.) 17 L. R. A., 602.

Wytheville.

LEWIS v. BERRYVILLE LAND & IMPROVEMENT Co.

JUNE 14th, 1894.

ASSESSMENTS—Defences—Subscriber—Transferee.—Though in suit to collect assessments to corporate stock from subscriber, he may set up under Code, § 3299, the defences of failure of consideration, fraud in the procurement of the contract, or any other matter which would entitle him to relief in equity, yet, *held*, those defences are personal to him, and do not pass to the transferee of the stock.

Argued at Richmond. Decided at Wytheville.

Error in judgment of circuit court of Clarke county, rendered December 6, 1892, in an action by the Berryville Land and Improvement Company against W. T. Lewis, to recover four assessments on the stock of said company which said Lewis had purchased from Samuel McCormick, the original subscriber therefor. Judgment being against Lewis, he brought the case here on error and *supersedeas*. Opinion states the case.

Moore & Koonslar and *Barton & Boyd*, for plaintiff in error.

M. McClannick and *John J. Williams*, for defendant in error.

LACY, J., delivered the opinion of the court.

This action was trespass on the case in *assumpsit*. The declaration demands \$206 for the price and value of goods sold

Opinion.

and delivered, and \$206 for other goods bargained and sold, &c., as in the common count.

The second count sets forth that one Samuel McCormick bought — shares of stock at the par value of \$25 per share; that McCormick afterwards assigned 80 shares of this stock to the defendant, who, responding to four calls for assessments, had paid in part, but owed now \$206 under last call.

To this the defendant tendered a large number of pleas, in substance setting up failure of consideration and breach of warranty.

The breach of warranty was as to such as were made to McCormick, the original subscriber, whose assignee the defendant was. The defendant moved to reject the pleas upon the ground that the warranty was alleged to have been to McCormick, and were personal to him, and did not pass to the defendant with the stock sold to him by McCormick.

The circuit court rejected the pleas, and there was judgment for the plaintiff. Whereupon the defendant applied for and obtained a writ of error to this court.

The defence set up is, as stated by the learned counsel for him in this court, “a total and complete failure of consideration, and an entire failure of consideration, and entire refusal, inability and disability of the plaintiff to perform on its part the promises and contracts made by the plaintiff.” The defence is set up under the very general terms of the amended law, embodied in section 3299 of the Code of Virginia, of failure in the consideration, and breach of the warranty, fraud in the procurement of the contract, and any other matter which would entitle the defendant to relief in equity.

In a case where such injury has resulted to the defendant by the acts of the plaintiff, there can be no question raised as to the right to relief under this statute, when such is set up by plea and sustained by proof. But in this case the pleas charge the conduct complained of against another person than the plaintiff. There have been no contract relations between the

Opinion.

plaintiff and the defendant. The stock was sold by the plaintiff to another person, and resold to the defendant, who is a transferer of the stock on which the calls are. If there has been such conduct on the part of the plaintiff, it was in its dealings with another stockholder, and if he has been injured he has demanded no redress. The question raised is, can the defendant set up the supposed injuries of a third person?

We are not called upon to decide more than was decided by the court below whose judgment we review, nor to suggest the proper remedy of any cause of action existing against the defendant for any other person. It is there decided in substance that the defendant cannot set up such defence and his pleas are rejected. And this is *not* error. Cook on Stock and Stockholders, § 156, says upon the authority of *Duranty's Case*, 26 Beavan, 268, that a transferrer of the shares cannot bring the suit, the fraud is personal to the original subscriber. We think this is right and must be affirmed.

JUDGMENT AFFIRMED.

Wytheville.

GIBSON v. BEVERIDGE.

JUNE 14th, 1894.

1. APPELLATE COURT—*Exceptions—Review*.—Where trial court refuses plaintiff leave to amend his declaration, and no exceptions to the ruling are taken before verdict, this court will not review such action of the trial court.
2. COMMON LAW PRACTICE—*Joint action—Dismissal as to one*.—Where in action against two who file joint plea of *non assumpsit*, and plaintiff has the action dismissed as to one, and asks leave to amend his declaration as to the other, and there is nothing to show that the defence relied on was personal to the former: *held*, no error to refuse such leave.
3. CONSTRUCTION OF STATUTES.—Code, § 3295, has no application to the case at bar.

Argued at Richmond. Decided at Wytheville.

Error to judgment of circuit court of the city of Richmond, rendered November 25, 1891, in an action of trespass on the case in *assumpsit*, wherein Richard Gibson was plaintiff, and William H. Beveridge and Giles B. Jackson were defendants. Opinion states the case.

George Wayne Anderson and *S. S. P. Patterson*, for plaintiff in error.

Shield & Newton, for defendant in error.

LEWIS, P., delivered the opinion of the court.

Opinion.

The plaintiff in error brought an action of trespass on the case in *assumpsit* against William H. Beveridge and Giles B. Jackson for an alleged breach of contract on the part of the defendants as his retained counsel in a criminal prosecution. The defendants jointly pleaded *non assumpsit*; and at a subsequent term, on motion of the plaintiff, it was "ordered that the suit be dismissed as to the defendant, Jackson." A jury was thereupon called, and a verdict rendered for the defendant, Beveridge. The plaintiff then moved for a new trial, on the ground that after the suit had been dismissed as to Jackson, the court refused to allow the plaintiff to amend the declaration by inserting an additional count against Beveridge alone, wherein, as appears from the bill of exceptions, the cause of action was stated somewhat more fully than in the original declaration, but the motion was overruled, and judgment entered on the verdict.

No exception appears to have been taken before the verdict to the action of the court in refusing leave to amend the declaration, and apart from this, we are of opinion that there is no error in the judgment of which the plaintiff can complain.

It is a general rule of the common law that in an action against several defendants upon contract, judgment must be either for or against all the defendants; and the rule is the same whether the contract is joint or joint and several. 1 Rob. (old) Pr., 400; *Steptoe v. Read*, 19 Gratt., 1; *Moffett v. Bickle*, 21 Id., 280; *Muse v. Farmers' Bank*, 27 Id., 252.

This rule, it is true, has been modified by our statute, which provides that "in an action founded on contract against two or more defendants, although the plaintiff may be barred as to one or more of them, yet he may have judgment against any other or others of the defendants against whom he would have been entitled to recover if he had sued them only." Code, sec. 3395. But this statute has no application to the present case, because here the only plea that was filed was a joint plea of *non assumpsit*, and there is nothing in the record (the material

Opinion.

portions of which have been already stated) which shows expressly, or from which it can be inferred, that the defence relied on was merely personal to Jackson, and did not concern his co-defendant. So that, for aught the record shows, the plaintiff was not entitled to proceed in the present action against Beveridge after the suit was dismissed as to Jackson, and hence there is no error in the record to his prejudice.

The judgment is, therefore, affirmed.

JUDGMENT AFFIRMED.

Wytheville.

McCULLOUGH v. HUNTER, TREASURER.

JUNE 14th, 1894.

1. SALES FOR TAXES—*Ex-Collector*.—Where power to sell land for taxes is given by a city charter to the city collector: *held*, such power ceases with his official term and a sale made by him after cessation of his term, is void.
2. MANDAMUS—*Treasurer—Deed*.—Where sale of land for taxes is made by an ex-collector, *mandamus* will not lie to compel the city treasurer to make a deed conveying the land to the purchaser. *Delany v. Goddin*, 12 Gratt., 206; *Boon v. Simmons*, 88 Va., 259.

Argued at Richmond. Decided at Wytheville.

Error to judgment of circuit court of the city of Norfolk, rendered June 11, 1890, in a proceeding for a *mandamus*, wherein A. A. McCullough, plaintiff in error here, was petitioner, and W. W. Hunter, treasurer of the said city, was defendant. Opinion states the case.

A. R. Hanckel and Sharp & Hughes, for plaintiff in error.

White & Garnett, for defendant in error.

LEWIS, P., delivered the opinion of the court.

This was a petition for a *mandamus* against the treasurer of the city of Norfolk, to compel him to convey to the petitioner

Opinion.

a parcel of land, situate in that city, which, it is alleged, was sold on the 1st day of September, 1886, to one Bond, the assignor of the petitioner, for the non-payment of city taxes.

The court below dismissed the petition on demurrer, and thereupon the case by writ of error was brought to this court.

By the 47th section of the charter of the city it is made the duty of the collector of city taxes to sell real estate delinquent for non-payment of taxes or assessments, and the same section requires the collector, on any such sale, to execute to the purchaser a certificate of sale, etc. And by the 51st section it is provided that "the purchaser of real estate sold for taxes and not redeemed shall, after the expiration of two years from the sale, obtain from the city treasurer a deed conveying the same, wherein shall be set forth what appears in his office in relation to the sale"; and by the same section provision is made for a conveyance to an assignee of the purchaser. Acts 1883-'84, pp. 42-3.

The petition filed in the court below states that the alleged sale was made by "the city collector in conformity with the terms of the charter." But it appears from an exhibit filed with the petition, as a part thereof, that the sale was made, not by the city collector, but by one Black, who styles himself "ex-city collector," and who thus signs the alleged certificate of sale.

We find nothing in the charter of the city, nor has our attention been called to any provision in the general law of the State, which authorizes sales of real estate delinquent for non-payment of city taxes in Norfolk to be made otherwise than under the provisions of the 47th section of the charter, which in express terms requires such sales to be made by *the collector*. This vests the power of sale, not in the person of the officer, but in the office, and hence the power ceases as to any individual when his term expires; so that a sale by the collector after the expiration of his term of office is a mere nullity. 2 Blackw., Tax Titles, sec. 754. "That no individual or public

Opinion.

officer," said Chief Justice Marshall in *Thatcher v. Powell*, 6 Wheat., 119, "can sell and convey a good title to the land of another, unless authorized so to do by express law, is one of those self-evident propositions to which the mind assents without hesitation"; and the same doctrine has been held by this court. *Boon v. Simmons*, 88 Va., 259, and cases cited.

If therefore, it were conceded that, upon the principle of the decision in *Delaney v. Goddin*, 12 Gratt., 266, the duty of the treasurer, under the 51st section of the charter, above referred to, in regard to making a deed to the purchaser, is purely ministerial, and hence that he has nothing to do with the regularity or validity of the previous proceedings, the fact would remain that he is required to convey only after there has been a sale by an authorized officer, viz: the collector; and as there has been no such sale in the present case, it follows that the order dismissing the petition must be affirmed.

JUDGMENT AFFIRMED.

Wytheville.

McKINNEY v. DANIEL.

JUNE 14th, 1894.

EJECTMENT—*Title of plaintiff.*—In order to recover the land sued for in ejectment, a good and sufficient title thereto must be shown in the plaintiff, who cannot recover on the defect of title in the defendant in possession. Code, § 2725.

Error to judgment of circuit court of Prince Edward county, rendered October 3, 1891, in an action of ejectment wherein Wm. Daniel was plaintiff and P. W. McKinney, Annie C. McKinney, and R. C. McKinney were defendants. The judgment being for the plaintiff, the defendants brought the case here on error. Opinion states the case.

J. P. Fitzgerald and Meade Haskins, for plaintiffs in error.

R. T. Hubbard, for defendant in error.

LACY, J., delivered the opinion of the court.

This action is ejectment for two small parcels of land in Farmville adjoining the land of the plaintiffs in error, and heretofore for many years used and occupied by the plaintiffs in error. It appeared at the trial that the plaintiffs in error, the defendants below, held this, or three parcels of land of irregular shape, containing about one-sixth of an acre, under a mistake, having bought the buildings erected thereon from the

Opinion.

United States government; the government not having acquired the land, did not and could not pass any title thereto. After a lapse of twenty years the plaintiff below discovering that the land in question had belonged to his ancestor, George W. Daniel, and had not been granted to the persons in possession, brought his action of ejectment to recover the same.

Under the evidence certified, it is established that the defendants had not acquired the title to the parcels from the government nor other person, and had no title to the same.

It was also proved that George W. Daniel left a will, and devised the land south of the railroad there situate, and on both sides of a small stream called Little Buffalo river, to his niece, Lucy K. Daniel, now Mrs. Lucy K. Kinckle, and that on the north side of the railroad and both sides of the little river aforesaid, to another niece, Anna T. Daniel.

The land in dispute answers the description of the land devised to Lucy by the ancestor. It does not appear to have been overlooked by the testator, but to have been disposed of by will. A controversy, taking the form of several suits between the parties claiming under the will of G. W. Daniel, was settled by written agreement, and embodied in a consent decree in the causes, whereby this land was left as the will left it, and it so remained for nearly twenty years before any claim was made to it by the plaintiff below, on the ground that it had been omitted from the will, or any other ground. It appears in the suit that the land does not belong to the defendants unless they have acquired title to it since suit brought, which the record shows they have made an effort to accomplish. But it is clear enough that it does not belong to the plaintiff, who, being without title, could not maintain his suit for it, whether the defendant had title or not.

“No person shall bring such action (as this) unless he has at the time of commencing it a subsisting interest in the premises claimed, and a right to recover the same, or to recover possession thereof, or of some share, interest, or portion thereof.” Code of Virginia, § 2725.

Opinion.

As the party in possession of property is presumed to be the owner until the contrary is proved, it is necessary for a claimant in ejectment to show in himself a good and sufficient title to the land, to enable him to recover it from the defendant. He will not be assisted by the weakness of the defendant's claim. The possession of the latter gives him a right against every man who cannot establish a title; and if he can answer the case on the part of the claimant by showing the real title to the land to be in another, it will be sufficient for his defence (except in those cases in which the relationship of landlord and tenant subsists between the parties, and the defendant is estopped from disputing his landlord's title), although he does not pretend that he holds the land with this consent, or under the authority of the real owners. *Dunbar, &c. v. Todd*, 6 Johns., 257; *Klock v. Hudson*, 3 Johns., 375; *Colston v. McKay*, 1 Marsh, 251; *Gilliland v. Woodruff*, 1 Cowen, 276; *Recard v. Williams*, 7 Wheat., 105, 106; *Preston v. Bowman*, 6 Wheat., 582.

The circuit court properly instructed the jury in the law, which appears to have been disregarded by them. And the circuit court should have set the verdict aside on the motion of the defendants. Which motion, however, the court overruled, which was error on the part of the said circuit court for which the said judgment will be reversed and annulled, and the case remanded for a new trial to be had therein.

JUDGMENT REVERSED.

Wytheville.

MYERS v. COMMONWEALTH.

JUNE 14th, 1894.

1. **CRIMINAL PROCEEDINGS—Continuance.**—At a murder trial the motion of accused for a continuance on the ground that an absent person, who had not been summoned, would, it was rumored, testify that one of the commonwealth's numerous witnesses present at the homicide, was an ex-convict, was overruled : *held*, no error.
2. **IDEM—Homicide—Burden of proof.**—A homicide is presumed by the law to be murder in the second degree, and if accused would lower the crime below that grade, the burden of proof is on him.

Error to judgment of circuit court of Lee county, refusing a writ of error and *supersedeas* to a judgment of the county court of said county, rendered April 20, 1893, whereby the plaintiff in error, Houston Myers, was sentenced to the penitentiary for five years for the murder in the second degree of John Lawson. Opinion states the case.

Jackson & Blankenship, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LACY, J., delivered the opinion of the court.

The plaintiff in error killed the deceased John Lawson with a pistol, and after shooting him in the belly, shot again and wounded him, and was about to shoot again apparently, when his pistol was wrenched from his hand.

Opinion.

The shooting was wholly without provocation, the offence given being unworthy of the name—requesting him to keep quiet and not use profane language, as ladies were near.

The palliation to excuse set up is that the plaintiff in error was drunk. But he was not so drunk as to be unconscious or insensible. The jury rendered a verdict of murder in the second degree and fixed the imprisonment at five years.

The accused moved the court to set aside the verdict and grant him a new trial, which motion the court overruled, and rendered judgment according to the verdict.

The defendant applied for a writ of error to the circuit court of Lee county which was refused, whereupon the case was brought to this court by writ of error.

The first error assigned is the action of the court in refusing a continuance on the ground that a witness was absent who would prove that one of the commonwealth's witnesses was an ex-convict in the Tennessee penitentiary. The witness not summoned had not been even seen by the affiant who undertook to establish his materiality, and the whole fabric being built upon an alleged rumor. There was no valid ground for a continuance if all could have been established as stated, and the witness John Lee had been excluded. There were numerous witnesses who saw the whole transaction of the shooting and who proved as much as Lee.

Second assignment is that the court erred in the instructions given; but the instructions are in no wise erroneous. They are in accordance with well settled principles.

Third assignment is that the evidence did not justify the verdict, and that the trial court erred in its action in refusing to set aside the verdict for that cause, and not granting a new trial to the accused.

A homicide is presumed by the law to be murder in the second degree, and if the accused would lower the crime below that grade, the burden of proof is on him. In this case he defends on the ground that he had in years gone by, and not nearer to the crime than two years, had fits.

Opinion.

The evidence shows that the verdict was not excessive, but supported by the proofs. The jury did right in not finding murder in the first degree under the circumstances, but the verdict of murder in the second degree is right, and the county court did not err in refusing to set it aside. There was no error in the judgment of the said county court, and the action of the circuit court in refusing a writ of error thereto was without error, and must be affirmed.

JUDGMENT AFFIRMED.

Wytheville.

RUFFIN v. COMMERCIAL BANK.

JUNE 14th, 1894.

1. INJUNCTION—*Power of lower court.*—Judge of lower court has no power when the case is at rules and that court is not in term, to increase the bond upon an injunction granted by a judge of this court after its refusal by the lower court, and its return and recordation therein, although it becomes in effect an order of that court, which might be acted upon as such by that court in term.
2. IDEM—*Collateral security.*—Where claim of adverse party is fully protected by collaterals, an order to increase an injunction bond, *held* error.
3. CHANCERY PRACTICE—*Usury.*—To dismiss on the ground that the plaintiff has ample remedy at law, a bill filed under Code, § 2822, against lender to discover the amount of money actually lent, &c., and its interest, and if the interest was more than lawful, that the lender shall recover only the principal and pay the costs: *held*, error.

Argued at Richmond. Decided at Wytheville.

Appeal from order of the judge of the hustings court of Danville, made April 8, 1892, in the suit of W. N. Ruffin against the Commercial Bank and others, and from decree of said court in said suit, rendered at its June term, 1892, dismissing the bill of the complainant, who appealed to this court. Opinion states the case.

Riely & Leigh, Julien Meade, Berkeley & Harrison, and A. J. Montague, for appellant.

Peatross & Harris, for appellee.

Opinion.

LACY, J., delivered the opinion of the court.

This bill was for an injunction to restrain the prosecution of two common law suits, and seeking under section 2822 of the Code of Virginia relief against usury.

The injunction prayed for was denied by the judge of the corporation court on the 30th of March and 1st of April, 1892, was granted by a judge of this court on the 2d of April, 1892, and a bond fixed at \$250. On the same day the Commercial Bank, the appellee, gave notice of a motion to have the bond under the injunction order increased, on the 6th day of April, 1892. On that day the motion was heard upon affidavits. Whereupon the judge of the corporation court increased the bond to \$2,500, which the plaintiff was not able to give, as his assets in large amounts were already in the hands of the bank, and constituted his chief property. Upon the affidavits, it appeared that the collateral deposited on the notes, which evidenced the debts sued on was ample to secure the payment of the debts.

The order of the judge of this court granting an injunction which had been refused by the lower court, is, when returned to the corporation court and recorded there, in effect, an order of that court. Therefore it cannot be denied that the judge of that court if so advised, might act upon it as an order of his own court, when it came before him, but this cannot be said to be so when the case is at rules, and the court is out of term. If this could be so, then the judge of the lower court might out of court annul the order for any cause. Whereas the contemplation of the law in such case is that the case shall be matured as any other case, and to be considered by the court when brought before it, as any other case within its jurisdiction.

If this, however, were otherwise and the contemplation of the law in such case is that the order of the judge of this court acting on an injunction refused by the lower court may be dia-

Opinion.

regarded at any stage, yet in this case I am of opinion that the judge below erred in increasing the bond in any amount. Under the circumstances of this case the debt was amply secured by collateral security in the hands of the creditor and the penalty of the bond was ample.

It appears further that upon demurrer the bill was dismissed, the remedy at law being held sufficient. This was erroneous, however the fact might be as to the action at law. The plaintiff was entitled to his remedy under section 2822, *supra*. And the effect of the decree was to annul the statute in this case, and was therefore erroneous and must be reversed and annulled, and the case be remanded, to be proceeded in under the statute, which provides that "any borrower of money or other thing may exhibit a bill in equity against the lender, and compel him to discover, upon oath, the money or thing really lent, and all bargains, contracts, or other shifts relative to such loan and the interest or consideration of the same. And if it appear that more than lawful interest was reserved, the lender shall recover only his principal money or other thing without interest, and pay the costs of the suit. If property has been conveyed to secure the payment of the debt, and a sale thereof is about to be made, or is apprehended, an injunction may be awarded to prevent such sale pending the suit."

The appellant is entitled to the benefit of this statute, which has been denied him.

The decree appealed from is reversed and annulled, and the cause must be remanded to the corporation court of Danville to be further proceed in, in accordance with this opinion.

DECREE AND ORDER REVERSED.

Wytheville.

KRISSE v. RYAN.

SAME v. CLARK.

JUNE 14th, 1894.

APPELLATE COURT—*Decision—Conclusiveness.*—Whatever is contained in the record on an appeal is supposed to have been passed upon, and whatever is passed upon here, and whatever might have been passed upon, in consideration of the record, is concluded and settled, and cannot be reopened by the lower court. *Campbell v. Campbell*, 22 Gratt., 640.

Argued at Richmond. Decided at Wytheville.

Appeal from two decrees of circuit court of city of Lynchburg in the suit of W. H. Ryan against P. A. Krise, and in the suit of W. E. Clark against same, rendered November 15, 1893. The decrees being adverse to the defendant, he appealed. Opinion states the case.

A. H. Burroughs and *Staples & Munford*, for appellant.

Tucker & Ingram, for appellee, Ryan.

W. W. Henry, for appellee, Clark.

LACY, J., delivered the opinion of the court.

These are subsequent second appeals in the cases of *Ryan v. Krise* and *Clark v. Krise*, decided in this court on the 16th

Opinion.

day of March, 1893, and reported in 89 Va., *Ryan v. Krise* on page 728, and *Clark v. Krise* on page 739, to which reference is made to fully explain the questions involved.

As will appear by an inspection of those cases, the circuit court was reversed for reasons then stated when the case went back to the circuit court. The appellant, Krise, in order to avoid the effect of the decrees in this court above referred to, moved that the case be remanded to the commissioner to retake the accounts, and reform the report, and filed in the Clark case an amended bill, which was asked to be considered as a bill of review, and prayed that the former decision in this court in these cases be reviewed and reversed by the circuit court, a petition for a rehearing here having already been filed and overruled.

And on the 15th day of November, 1893, the circuit court decreed that in so far as the said bill of P. A. Krise seeks to correct errors of law in the opinion and decrees of the Supreme Court of Appeals, it is inadmissible, and that it does not meet the requirements of review for after-discovered evidence, and being of opinion that the matters alleged in the said bill must be considered as passed upon and determined by the Supreme Court of Appeals in its said opinions and decrees, doth refuse the motion for a continuance, and doth dismiss the said bill in the Clark case. And being of opinion that it is precluded by the opinion and decrees of the Supreme Court of Appeals from passing upon the question of the finalty of the commissioner's report, or on any other defence set up by Krise, overruled his motion to refer the cases back to a commissioner, and rendered a decree in accordance with the opinion of this court in the said cases in the first appeal above referred to.

From this decree Krise appealed. The decrees, however, are plainly right and must be affirmed. The cases in this court are numerous and without dissent, that what is contained in the record on an appeal is supposed by the law to have been

Opinion.

passed upon, and whatever is passed upon here, or might have been passed upon on consideration of the record in question is concluded and settled. *Findlay v. Trigg*, 83 Va., 543; *Price v. Campbell*, 5 Call, 115; *Campbell v. Campbell*, 21 Gratt., 649, where it is said by this court: "An appeal from a decree brings up the whole proceedings in the case prior to the decree, and either party can have any error against him in these proceedings corrected without the necessity of a cross appeal in any case. If a party fail to complain of any such error, and a decree be made upon appeal without correcting or noticing the error, such party will be concluded by the decree from appealing afterwards." See *Stuart v. Palmer & Preston*, 80 Va., 625; *Lore v. Hash*, 89 Va., 277; *Ins. Co. v. Clemmitt*, 77 Va., 366; *Woodson v. Leyburn*, 83 Va., 847; *Carter v. Hough, Gray & Co.*, 89 Va., 503. "Matters once determined in this court cannot be reopened, and this is true whether actually adjudicated or not. If they could have been adjudicated in that suit they are equally settled." *Whittle v. Saunders*, 75 Va., 573; *McCullough v. Dashiell*, 85 Va., 41; *Findlay v. Trigg*, 83 Va., 542; *Effinger v. Kenney*, 79 Va., 551.

The decree complained of in these causes, and appealed from here, is in accordance with the foregoing cases and many others in this court, and is plainly right, and must be affirmed.

LEWIS, P., and RICHARDSON, J., dissented.

DECREES AFFIRMED.

Wytheville.

MILBURN WAGON CO. v. NISEWARNER.

JUNE 14th, 1894.

1. SALES—*Warranty in catalogue—Breach—Damages.*—Where defendant is induced to buy wagons by warranty in plaintiff's catalogue, that they were well made of good, thoroughly-seasoned material, and strong enough to carry the weight mentioned in catalogue: *held*, that he is entitled to rely thereon and to recover damages for any breach thereof, though his order was on plaintiff's form covenanting that if any breakage occurred within a year from defective material or workmanship, the same should be repaired without cost on production at the factory of the broken or defective parts, and though such parts were not produced there.
2. APPELLATE COURT—*Objections too late.*—In action on notes for price of said wagons, where breach of the said warranty is pleaded under Code, § 3299, *held*, too late to object in this court for first time that the wagons were warranted as "farm wagons" and were used for other purposes.

Argued at Richmond. Decided at Wytheville.

Error to judgment of circuit court of Rockingham county, rendered October 28, 1892, in an action of debt, wherein the Milburn Wagon Company was plaintiff, and Emma S. Nisewarner was defendant. Opinion states the case.

Sipe & Harris, for plaintiff in error.

O. B. Roller and Charles D. Harrison, for defendant in error.

LEWIS, P., delivered the opinion of the court.

Opinion.

This was an action to recover the amount of sundry negotiable notes given for two lots of wagons sold by the plaintiff, the Milburn Wagon Company, to the defendant, Emma S. Nisewarner. The defendant pleaded the general issue, and also a special plea of setoff, under section 3299 of the Code, setting up a breach of warranty, and claiming damages to the amount of \$4,250 82. The jury returned a verdict for the defendant for \$533 56 damages, after deducting the debt claimed in the declaration; and the defendant, at the suggestion of the court, agreeing to reduce the damages to \$200, there was judgment accordingly.

The single question in the case is, whether there was error in overruling the plaintiff's motion for a new trial, the ground of which motion was that the verdict was not warranted by the evidence.

The plaintiff is a manufacturer of wagons, having its chief place of business at Toledo, Ohio. The sale to the defendant of the first lot of wagons, twenty-four in number, was made in October, 1890. This sale was effected through an agent, who exhibited to the defendant's agent at Harrisonburg the company's printed catalogue, and solicited him to purchase. He also exhibited a patented hub, as a sample of the hubs used by the plaintiff in its business. The catalogue contained a minute description of the plaintiff's wagons, and represented them as having "no superior," and probably "no equal in this country." It also contains the following warranty, viz.: "We warrant our wagons to be well made, of good, thoroughly seasoned material, and of sufficient strength to carry the weight mentioned in our catalogues."

The order for the twenty-four wagons was written on a printed form, furnished by the plaintiff's agent, upon the back of which was the following "WARRANTY," viz.: "Should any breakage occur, within one year from date of purchase, by reason of defective material, or workmanship, repairs for same will be furnished at our factory free of charge, upon the purchaser pro-

Opinion.

ducing the broken or defective parts, as evidence, or an amount equal to the list price of such part, less the same discount as is given on this order will be paid in cash."

Several months afterwards another order, for six wagons, was given by the defendant. It does not appear that this order was made out on a like form to that above mentioned, but the defendant's agent, who gave it, says "the order was by letter, upon the representation set forth in the catalogue."

Upon the question of the quality of the wagons, numerous witnesses, mostly purchasers from the defendant, were called in her behalf; and this evidence, which is uncontradicted, establishes conclusively that the wagons were not only not up to the standard represented in the catalogue, but that they were of an extremely inferior quality, both as regards workmanship and material used in their construction. Most of the witnesses speak of them as "no good"; and several wagon-makers living in the defendant's neighborhood, who were called on to repair some of the wagons, speak of them in the same way.

The appellant's contention, however, is that the only warranty in the case is that on the back of the printed order, and that that was not complied with. As already stated, the second lot of wagons were ordered by letter; and, besides, the counsel are mistaken in supposing that the only warranty is that on the back of the printed order. The evidence shows that all the wagons were ordered "upon the representations set forth in the catalogue"; and in the catalogue they were expressly warranted to be "well made of good, thoroughly seasoned material, and of sufficient strength to carry the weight mentioned" in the catalogue.

There is no evidence in denial of the fact that this was intended and understood by the parties as a warranty. It is certain the defendant was induced by it to enter into the contracts in question, and there is no doubt she had a right to rely upon it. It is, therefore, as it purports to be, a warranty, and was admitted as evidence, without objection, at the trial.

Opinion.

Mason v. Chappell, 15 Gratt., 572; *Herron & Holland v. Dibrell Bros.*, 87 Va., 289; *Enger v. Dawley*, 62 Vt., 164; S. C., 19 Atl. Rep., 478.

Nor is there any conflict between this and the warranty on the back of the printed order. The latter merely provides how ordinary breakages may be made good, and was not intended to affect the former in any way. Besides, it was proved that "repairs were sent for, but were not furnished"; and another witness states that a wheel was sent to the company, and never afterwards heard of; "that the company denied receiving it, but that a tracer was put on it, and it was traced to Toledo."

Another point made by the appellant is that the wagons were used for a different purpose than for which they were sold to the defendant; that is, that they were sold or represented in the catalogue as farm wagons, and afterwards used in hauling wood and bark to market. How many of the wagons were thus used does not appear; nor are we prepared to say, in the absence of any evidence on the subject, that wood and bark are not farm products, or that the use to which the wagons were put was not within the contract. But be that as it may, no such question appears to have been raised in the trial court, and it is too late now to raise it here.

The only remaining question is, whether the finding of the jury or the amount for which judgment was given is so excessive as to entitle the appellant to a new trial.

The total purchase price of the wagons was \$1,729 06, of which the defendant paid in money \$1,108 91, leaving a balance of \$620 15, for which the action was brought. But this balance is to be credited by \$318 10, the aggregate of sundry notes turned over by the defendant, and received by the plaintiff as cash. This reduces the claim to \$302 05. A further credit of \$167 11 is conceded by the appellant, which leaves \$134 94; and this, added to the \$200 for which the judgment was rendered, amounts to \$334 94.

Opinion.

It appears, moreover, that the defendant warranted the wagons, and that a number of the purchasers have refused, on account of the alleged worthlessness of the wagons, to pay balances on their purchases aggregating \$393 50. Besides this, the defendant paid out for repairs \$47 75, to say nothing of freight bills, amounting to over \$100, nor of the alleged injury to her business by reason of handling the wagons; all of which properly entered into the consideration of the case under the averments of the special plea.

There is no error, therefore, in the judgment to the prejudice of the appellant, and the same is affirmed.

JUDGMENT AFFIRMED.

Wytheville.

LAKE v. TYREE.

JUNE 14th, 1894.

1. PRACTICE AT COMMON LAW—*Pleading—Demurrer*.—Where a plea avers no injury to defendant from the fraudulent misrepresentation as to the lot referred to in it: *held*, a demurrer lies to the plea.
2. IDEM—*Declarations of agent—Hearsay*.—Agent's admission binds principal only when made whilst the transaction is going on. If made afterwards, it is mere hearsay.
3. IDEM—*Evidence—Bills of exceptions*.—In determining questions of admissibility of evidence, this court cannot look outside of the bills of exception taken to its exclusion.
4. IDEM—*Instructions—Burden of proof*.—In action on check given for price of land, there is a plea of *nil debet* and also a special plea of fraud in the sale, and the jury is instructed that the defendant must prove his special plea, but the plaintiff's duty to prove the case made in his declaration is ignored: *held*, such instruction works no injury to the defendant where it is given after the evidence relating exclusively to the special plea, has been closed.
5. IDEM—*Modern covenants*.—Such covenants, now used in place of ancient warranty, may affect the nature and quality of the thing sold, but are stipulations in the conveyance and not representations to induce the purchase of the thing sold.
6. IDEM—*Verdict—Judgment*.—Where in action of debt on a check, declaration demands a sum certain and interest, there is a verdict for "the amount of the debt in the declaration mentioned": *held*, the judgment may be for "the principal and charges of protest with interest thereon from the date of such protest." Code, § 2853.
7. SALE OF LAND—*Misrepresentations—Opinions*.—In order to support action of deceit, or suit in equity for rescision, misrepresentations must be of a material fact inducing the purchase, and on which purchaser has a right to rely, and did rely, and whereby he was actually misled to his injury. *Lowe v. Trundle*, 78 Va., 65. But representations that lots sold are

Syllabus—Statement—Opinion.

“good building lots, and valuable,” are mere expression of opinions not constituting actionable fraud, where there is no intent to defraud, and seller uses no artifice to prevent him from making inquiries or examinations as to the lots, and they are at hand and accessible.

8. *IDEM—Case at bar.*—Plaintiff induced defendant to buy certain lots by representing them to be level and suitable for building on. Neither had ever seen them. Same day defendant found the lots deeply gullied—one thirty feet below level of street, the other on a steep declivity. Seeing this, he demanded his check given for the price. Plaintiff used no artifice to prevent defendant from examining the lots, which were accessible: *held*, the defendant is without remedy.

Argued at Richmond. Decided at Wytheville.

Error to judgment of circuit court of Madison county, rendered September 20, 1891, in an action of debt on a protested inland bill of exchange, wherein William R. Tyree was plaintiff, and Robert P. Lake was defendant. Judgment having gone against the latter, he obtained a writ of error and *supersedeas* from one of the judges of this court. Opinion states the case.

James G. Field and Rixey & Barbour, for plaintiff in error.

Jas. Hay and T. C. Gordon, for defendant in error.

LEWIS, P., delivered the opinion of the court.

This was an action of debt to recover the amount of a certain check for \$1,100, and \$2 50, costs of protest. The check was given by the defendant to the plaintiff on the 9th of October, 1890, in payment of ten shares of the capital stock of the Goshen Land and Improvement Company and four lots of land situate in Goshen, which had been drawn, the day before, by the plaintiff as the owner of the said shares. The defendant pleaded the general issue, and also two special pleas, under section 3299 of the Code, averring fraud in the procurement of the contract in question. To the first special plea there was a

Opinion.

demurrer, which was sustained; and issue having been joined on the remaining pleas, the parties went to trial, which resulted in a verdict and judgment for the plaintiff.

1. As to the first ground of error, viz.: the sustaining of the demurrer to the first special plea, it is enough to say that there is no averment of injury to the defendant in consequence of the alleged fraudulent misrepresentations in regard to the value and description of the lots referred to in the plea, which renders the plea clearly bad. The defence set up in the plea is an equitable one, allowed by the statute, in the nature of a cross action for the rescission of the contract; and in such a case, as in an action of deceit, the complainant must allege and prove (1) fraud, on the one side, and (2) consequent injury to the complainant, on the other; for fraud consists, not in mere intention, but in intention carried out by hurtful acts. It consists of conduct that operates prejudicially on the rights of others. That "fraud without damage, or damage without fraud, gives no cause of action" in such a cause is an ancient rule of the common law for which the citation of authority is unnecessary.

2. The next question relates to the exclusion of certain evidence at the trial. It appears that in the afternoon of the day on which the transactions in question occurred, and after the check had been delivered to the plaintiff, the defendant, accompanied by one Wilson, went out to inspect the lots, which were in the immediate vicinity. Wilson was a real estate agent at Goshen, in whose hands the plaintiff had placed the lots "for sale"; and the offer at the trial was to prove that when the inspection was made Wilson said to the defendant: "These lots are not such as I represented to you. It is evidently a fraud, and I do not think you should take them."

This evidence the lower court excluded, and, as we think, correctly. The rule is that the admission or declaration of an agent binds the principal only when it is made during the continuance of the agency, in regard to a transaction then depending *et dum ferveat opus*, and if not thus made it

is no part of the *res gestæ*, but hearsay, and therefore inadmissible. 1 Greenl. Ev., sec. 113; *Virginia and Tennessee Railroad Co. v. Sayers*, 26 Gratt., 328. Here the declaration sought to be proved was not made during the continuance of the agency, but after it had ceased to exist. The contract was executed; the transaction had been terminated; or, as the defendant himself testified, the sale had been "closed." The bargain was made, and the check for the purchase price delivered before dinner, and the declaration made "after dinner," with an interval, perhaps, of several hours between them. When the sale was closed the business was completed, and the agency was *functus officio*; and there is no more reason for holding that it continued two hours thereafter than there would be to say that it continued as many years thereafter, or that it will continue indefinitely.

It was also contended in the argument at the bar that the declaration ought to have been received, on the ground that it was reported to the plaintiff in the presence of Wilson and the defendant, and not contradicted by the plaintiff. But as to this it is enough to say that there is no mention of any such fact in either of the bills of exception that were taken to the exclusion of the evidence, and in determining this branch of the case we are not at liberty to look outside of those bills.

3. The next question, then, is: Ought the verdict to have been set aside on the ground that it was contrary to the law and the evidence? The defence set up in the second special plea was that the contract was procured by fraud—that is, that the plaintiff represented the lots to be smooth and level, and suitable for building purposes, which representation, it is alleged, were false, and fraudulently made with intent to deceive and defraud the defendant, &c.

The general rule in regard to misrepresentations in the sale of property which will support an action of deceit or a suit in equity for rescission, is that the representation must be in regard to a material fact, constituting an inducement to the con-

Opinion.

tract, on which the complainant had a right to rely, and did rely, and by which he was actually misled to his injury. *Lowe v. Trundle*, 78 Va., 65. The mere expression of an opinion, however, even in strong and positive language, is no fraud, though it be false. Such statements are not fraudulent in law, because, as was said by Judge Staples in *Grim v. Byrd*, 32 Gratt., 293, they do not, ordinarily, deceive or mislead, but are considered, as the Supreme Court of the United States expressed it in a recent case, as "trade talk," which is allowable. *Southern Development Co. v. Silca*, 125 U. S., 247.

In the early case of *Bayly v. Merrel*, Cro. Jac., 386, it was adjudged that "the law gives no remedy for voluntary negligence," and so the law is at the present day. Hence, generally speaking, if the parties have equal means of information, so that, with ordinary prudence or diligence, either may rely on his own judgment, they are presumed to have done so; or, if they have not done so, they must abide the consequences of their own folly or carelessness.

Upon this subject Judge Cooley says: "Where ordinary care and prudence are sufficient for full protection, it is the duty of the party to make use of them. Therefore, if false representations are made regarding matters of fact, and the means of knowledge are at hand and equally available to both parties, and the party, instead of resorting to them, sees fit to trust himself in the hands of one whose interest it is to mislead him, the law, in general, will leave him where he has been placed by his own imprudent confidence. "It is for this reason," he adds, "that redress is often refused where fraud is alleged in the sale of property which was at hand, and might have been inspected, and where the alleged defect was one which ordinary prudence would have disclosed." Cooley, Torts, 487.

It was on this principle that *Parker v. Moulton*, 114 Mass., 99, was decided. There it was held that false representations by the vendor to the vendee concerning the value of the land sold,

Opinion.

its condition, or adaptation to particular uses, will not entitle the vendee to relief, unless he is fraudulently induced to forbear inquiries or examination which he would otherwise have made; and that if fraud of the latter description is relied on, it must be specifically set forth in the pleadings.

To the same effect is *Long v. Warren*, 68 N. Y., 426, which, also, was the case of a sale of land, and in which this whole subject was fully considered. The substance of the decision was that where it appears that the real quality of the property was at the time of sale obvious to ordinary intelligence; that it was at hand, open for inspection; that both vendor and purchaser had equal knowledge or equal means of acquiring information; that nothing was said or done by the vendor to throw the purchaser off his guard, or to divert him from making the inquiries and examination which a prudent man ought to make; and that he omitted to make them, or to avail himself of the means and opportunities at his hand, relying upon false representations of the vendor, he cannot sustain an action for fraud.

"The common law," says Chancellor Kent, "affords to every one reasonable protection against fraud in dealing, but does not go to the romantic length of giving indemnity against the consequences of indolence and folly, or a careless indifference to the ordinary and accessible means of information." 2 Kent, Comm., 485.

This pithy statement of the law was quoted with approval in *Smith v. Richards*, 13 Pet., 26; and in the subsequent case of *Slaughter v. Gerson*, 13 Wall., 379, it was laid down as the established doctrine, in conformity with the authorities already cited, that where the means of knowledge are at hand and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived by the vendor's misrepresentations; that if, having eyes, he will not see matters directly before them, where no concealment is made or at-

Opinion.

tempted, he will not be entitled to favorable consideration when he complains that he has suffered from his own voluntary blindness, and been misled by over-confidence in the statements of another.

Bishop tersely states the rule deducible from the authorities to be that "the law, departing from the rule in morals, tolerates a good deal of lying in trade, when in the nature of merely puffing one's own goods or depreciating those of another, provided the thing bargained about reveals its own qualities, and is open to the parties' equal inspection." Bish. Cont., sec. 664, citing, among other cases, *Hill v. Bush*, 19 Ark., 522; *Poland v. Brownell*, 131 Mass., 138.

Coming now to apply these principles to the present case, it is to be observed, in the first place, that the evidence (not the facts) being certified, the defendant occupies in this court the position of a demurrant to evidence; thus necessarily waiving all of his own evidence in conflict with that of the plaintiff, and admitting the truth of the plaintiff's evidence. This leaves the facts of the case to be considered few and simple.

The defendant testified that he went to Goshen, on the occasion in question, without any intention of investing in property there, but that soon after his arrival he was solicited by the plaintiff to purchase the stock and lots in question, who represented the lots to be smooth and level, and suitable for building purposes. He says he had never seen the lots, but that, relying on the representations of the plaintiff, he agreed to purchase, and that thereupon "the sale was closed." Afterwards, on the same day, he went with the agent (Wilson) to inspect the lots, he says, and found them, not as they had been represented to him, but "badly washed into deep gullies"; that one of them was "in a boggy gorge, thirty feet below the level of the street"; and another on a steep declivity; that seeing this, he at once returned to the plaintiff, and declared he had been deceived, and demanded the return of his check, &c.

But all this, so far as the alleged representations are con-

Opinion.

cerned, the plaintiff denies, and, on a demurrer to evidence, must be laid out of view. He testifies that he made no representations of any sort to the defendant, and had no conversation with him on the subject of the lots, or their character or value; that he himself had never seen them, and that the property was sold "as a pig in a bag." It was also proven that he was a non-resident of the State.

Wilson, however, as a witness for the defendant, testified that when *he* approached the defendant with a suggestion to purchase, he, as the plaintiff's agent, represented to him that "the lots were good building lots, and valuable." He says further that at that time he had never seen them, and that when he and the defendant afterwards inspected them he saw they were not what he had represented them to be. It is not claimed, however, that he was guilty of intentional fraud; and it is obvious, besides, that his representations were the mere expression of an opinion—viz: that they were "good building lots, and valuable." Nor is it proved, or even alleged, that either the plaintiff or Wilson used any artifice to dissuade or prevent the defendant from making inquiries or examination touching the lots, which he could easily have done, as they were at hand and accessible. So that, having been thus indifferent to the ordinary and available means of information, the law gives him no redress against the consequences of his own voluntary negligence or folly.

4. Complaint is also made of the action of the trial court in giving certain instructions for the plaintiff and in refusing to give others offered by the defendant. One of those given for the plaintiff was this: "Under the pleadings in this cause the defendant cannot rely on any breach of warranty made by the plaintiff."

There is certainly nothing in this instruction to the prejudice of the defendant. The defence was not founded on an alleged breach of warranty, for there was no warranty in the case, but on an alleged fraudulent sale; and while the modern

Opinion.

covenants which have taken the place of the ancient warranty, may, as the appellant insists, affect the nature and quality of the thing sold, yet these, as the name implies, are stipulations in a deed of conveyance. 2 Min. Insts., 638.

The court also instructed the jury that "the burden of proof is on the defendant to establish the defence set up in his special plea, in order to relieve him of the liability created by the inland bill of exchange sued on." The objection urged to this instruction is that it ignored the duty of the plaintiff to establish the case made in the declaration, which was contested by the plea of *nil debet*. The instruction, however, worked no injury to the defendant, because it was given after the evidence had been closed, and the evidence, after the check sued on had been introduced before the jury, related exclusively to the defence set up in the special plea.

As to the remaining instructions, we need only say that, in the light of the principles applicable to the case, which has been stated, there is nothing in them to the prejudice of the defendant.

5. The next and last assignment of error is that the court erred in giving a judgment for interest. The verdict was simply for "the amount of the debt in the declaration mentioned," which, as stated in the declaration, was "the sum of \$1,102 60, with interest thereon from the 14th of October, 1890, until paid," and there was judgment accordingly, with costs. Section 2853 of the Code provides that in a case of this sort judgment may be given "for the principal and charges of protest, with interest thereon from the date of such protest." The legal effect of the verdict was a finding for the principal sum mentioned in the declaration, with interest, as therein claimed; so that the judgment is in conformity both with the verdict and the statute.

FAUNTLEROY, J., dissented.

JUDGMENT AFFIRMED.

Wytheville.

HALE v. HALE.

JUNE 14th, 1894.

1. **WILLS—Specific enforcement—Oral agreement.**—An oral agreement between two sisters to make mutual wills cannot be specifically enforced after the death of one of them on the ground of part performance, where there has been no further performance than the making and preserving of the wills and the will of the decedent has been revoked by her marriage after its execution.
2. **IDEM—Contract to make—Statute of fraud.**—One may by a certain and definite contract, bind himself to dispose of his estate by will in a particular way, and such contract in a proper case will be specifically enforced in equity. But such contract in respect to real estate is within the statute of frauds. Code, § 2840. The memorandum in writing required by that statute must contain all the essential elements of the contract (except the consideration), without recourse to parol proof.
3. **IDEM—Case at bar.**—The requirement of § 2840 is not satisfied where (as in the case here) the only memorandum is one of two mutual wills, neither referring to the other or to any other writing.
4. **PART PERFORMANCE—What is.**—Acts of part performance to take a parol contract out of the statute of frauds, must be of such unequivocal nature as of themselves to be evidence of the existence of an agreement; as for example, where, under parol agreement to sell land, the purchaser is put in possession, and makes improvements.
5. **ESTOPPEL—Mistake of law.**—The mistaken view of a testatrix that her marriage subsequent to the execution of her will, was not a revocation thereof, does not estop her heirs from claiming that the will was revoked under Code, § 2517.

Appeal from decree of circuit court of Franklin county, rendered October 8, 1891, in a cause wherein the appellant, Mary D. Hale, was complainant, and the appellees, John S. Hale,

Statement—Opinion.

and others, were defendants. By the decree the demurrer to her bill was sustained and her suit dismissed, and she appealed. Opinion states the case.

E. C. Burks, for appellant.

P. H. Dillard and *R. G. H. Kean*, for appellees.

LEWIS, P., delivered the opinion of the court.

The appellant, Mary D. Hale, filed her bill for the specific performance of an alleged parol contract. The bill states that the plaintiff and her sister, Janie Hale, agreed, in 1885, to make mutual wills, so that the survivor would get the whole estate, real and personal, of the one who should die first; and that each thereupon made a will in the other's favor, in conformity with the agreement; that in October, 1888, the said Janie intermarried with Dr. Carter Berkeley, and soon afterwards died without issue born alive; that some time prior to her marriage she was advised, upon consultation with an attorney, that her marriage would have no effect on her will, and that with this desire and belief, in which the plaintiff shared, she died, and for that reason never republished the will after her marriage; that for the same reason the plaintiff has allowed her own will to remain in full force as originally written, so as to carry out the agreement; that from the date of the wills until the death of Mrs. Berkeley they were kept together in a trunk, used jointly by the plaintiff and Mrs. Berkeley, from which they were taken after the death of the latter. The bill also states that the execution of one will was the consideration for the other, and that the two read together show the contract between the parties, and the consideration for the same; that the plaintiff has fully performed the contract on her part, and that both she and Mrs. Berkeley always believed that the latter had performed it on her part. And the prayer

Opinion.

of the bill was that the contract be specifically enforced, by requiring the heirs at law of Mrs. Berkeley, or some one for them, to convey to the plaintiff the real estate that descended to them at her death. There was no contest as to the personalty. The bill was dismissed on demurrer.

1. The appellant properly admits that by force of the statute, now carried into section 2517 of the Code, the will of Mrs. Berkeley was revoked by her marriage, regardless of her intention or wishes in the matter. But it is contended that the antecedent contract remains, and ought to be enforced.

There is no doubt, notwithstanding a will is in its nature ambulatory until the testator's death, and cannot be made irrevocable, that a person may by a certain and definite contract bind himself to dispose of his estate by will in a particular way, and that such a contract, in a proper case, will be specifically enforced in equity: that is to say, the property will be held charged with a trust in the hands of the heir at law, devisee, personal representative, or purchaser with notice of the agreement, as the case may be, and a conveyance or accounting directed in accordance with the terms of the agreement. 3 Pas. Cont., 406; Schouler, Wills, sec. 454; *Izard v. Middleton*, 1 Desaus., 116; *Rivers v. Rivers*, 3 *Id.*, 190; *Parcell v. Stryker*, 41 N. Y., 480; *Mundorf v. Kilburn*, 4 Md., 459; *Johnson v. Hubbell*, 10 N. J. Eq., 332.

In a note to the last mentioned case in 66 American Decisions, where the cases are collected, the annotator (at p. 784) says: "It is not only in harmony with sound principle that a person may make a valid agreement binding himself to dispose of his property in a particular way by last will and testament, but it is supported by an almost unbroken current of authorities, both English and American"; and substantially the same principle was recognized in *Rice v. Hartman*, 84 Va., 251.

2. But a parol agreement to devise real estate is within the statute of frauds, which in Virginia, so far as it is pertinent to the present case, enacts that "no action shall be brought * * *

Opinion.

upon any contract for the sale of real estate, or for the lease thereof for more than a year, * * * unless the contract, * * * or some memorandum or note thereof, be in writing and signed by the party to be charged thereby, or his agent; but the consideration need not be set forth or expressed in the writing, and it may be proved (where a consideration is necessary) by other evidence." Code, sec. 2840.

In the case at bar the agreement sought to be enforced was a verbal one, and the defence of the statute is set up as one of the grounds of demurrer. It is not contended, in support of the demurrer, that the alleged agreement is void, but only that, if there was any such agreement, it is not enforceable, consistently with the statute, in a court of justice.

On the other hand, the appellant contends that the case is not within the statute, because the wills in question are sufficient *memoranda* of the agreement to satisfy the requisitions of the statute. But can this view be maintained? We think not. An examination of the wills, which are exhibited with the bill, shows that each purports to be a mere will, and nothing else. Neither alludes to any contract or refers to any other writing; and the established rule is that the memorandum of a contract for the sale of real estate, required by the statute, must show, either on its face or by reference to some other writing, the contract between the parties, so that it can be understood without having recourse to parol proof. *Browne*, Stat. Frauds, sec. 371; 2 Kent, Comm., 511; *Parkhurst v. Van Cortland*, 1 Johns. Ch., 273; *Williams v. Morris*, 95 U. S., 444.

In *Grafton v. Cummings*, 99 U. S., 100, the Supreme Court of the United States, in construing the New Hampshire statute, which in this particular is similar to the statute 29 Car. II, laid it down, in conformity with the English decisions, that the memorandum must contain all the essential elements of the contract, including the consideration; and the remark is applicable to a case arising under our statute, except that in Virginia the consideration need not be set forth.

Opinion.

The appellant relies upon a *dictum* of Judge Flemming in *Campbell v. Argenbright*, 3 H. & M., 144, 197, to the effect that the will there in question was a sufficient memorandum of the parol promise set up in the bill; but the point was not decided, as in that case there was a subsequent written agreement, which referred to the will.

3. The equitable doctrine of part-performance is also invoked; but as to this, we may say, as was said in a similar case in Massachusetts, that "there has been no part-performance which amounts to anything." *Gould v. Mansfield*, 103 Mass., 408. In that case there was, as here, an alleged oral agreement between two sisters to make mutual or reciprocal wills, and each made a will accordingly. Afterwards one of the sisters made a different will, and died. The survivor then filed a bill for the specific execution of the agreement, but a demurrer to the bill was sustained, on the ground that the case was within the statute of frauds.

Notwithstanding the criticism upon that case in the argument at the bar, we are of opinion that it was decided upon correct principles. Not only is it a cardinal feature of a will that it is ambulatory until the testator's death, but acts of part-performance by the party seeking specific execution, to take a case out of the statute, must be of such *an unequivocal nature as of themselves to be evidence of the existence of an agreement*; as, for example, where, under a parol agreement to sell land, the purchaser is put into possession, and proceeds to make improvements. 2 Min. Insts. (4th ed.), 853; 3 Pom. Eq., sec. 1409. In the language of Lord Hardwicke, the act of part-performance "must be such as could be done with no other view or design than to perform the agreement." *Gunter v. Halsey*, Amb., 586. "The principle of the cases," said Sir William Grant in *Frome v. Dawson*, 14 Ves., 387, "is that the act must be of such a nature that, if stated, it would *of itself* infer the existence of some agreement; and *then* parol evidence is admitted to show what the agreement is."

Opinion.

In *Phillips v. Thompson*, 1 Johns. Ch., 131, Chancellor Kent said: "It is well settled that if a party sets up part-performance, to take a parol agreement out of the statute, he must show acts unequivocally referring to, and resulting from, *that* agreement; such as the party would not have done, unless on account of that very agreement, and with a direct view to its performance; and the agreement set up must appear to be the same with the one partly performed. There must be no equivocation or uncertainty in the case." To the same effect is *Wright v. Puckett*, 22 Gratt., 370.

This whole subject was very fully considered, both upon principle and authority, in *Maddison v. Alderson*, a recent and instructive case in the House of Lords. (8 App. Cas., 467.) In that case the appellant was induced to serve the intestate as his housekeeper without wages until his death by an oral promise on his part to leave her an interest in certain real estate; and he made a will for that purpose, which he signed, but which failed for want of due attestation. Mr. Justice Stephen, before whom the case was tried in the first instance, held that there was a contract which had been partly performed; but on appeal, first to the Court of Appeal, and afterwards to the House of Lords, this ruling was held to be erroneous; and the principle was laid down that an act of part-performance, to take a case out of the statute, must be sufficient of itself, without any other information or evidence, to satisfy the court, from the circumstances it has created and the relations it has formed, that they are only consistent with the assumption of the existence of *a contract* the terms of which equity requires, if possible, to be ascertained and enforced.

This is so, because, as was said in the same case, the defendant in a suit founded on such part performance is really "charged" upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself. Hence, until such acts are shown as of themselves imply the existence of *some* contract,

Opinion.

parol evidence to show the terms of the contract relied on is inadmissible. *Browne*, Stat. Frauds, sec. 455; *Dale v. Hamilton*, 5 Hare, 381; *Maddison v. Alderson*, *supra*.

Now the alleged acts of part performance in the present case, taken singly or collectively, do not bring the case within these principles. The making and preserving the wills, under the circumstances stated in the bill, while they are acts consistent with, are yet not demonstrative of, the existence of any contract between the parties, or, in other words, they do not unequivocally show that there was a contract. *Non constat*, the wills were not made from motives of love and affection, and independently of any contract or agreement; and this being so, parol evidence to establish the alleged contract would not be admissible.

4. Nor is there any ground for holding the defendants estopped from setting up the statute. Here, for aught the bill states, there was no fraud on the part of Mrs. Berkeley, nor has the appellant been induced to alter her position to her injury or loss. *Glass v. Hulbert*, 102 Mass., 34. It is true, as the demurrer to the bill admits, that Mrs. Berkeley lived and died in the belief that the validity of her will had not been affected by her marriage; that she in effect so declared on her death-bed; and that the appellant has never revoked her will. But the mistaken view of the parties as to the legal effect of the marriage cannot, consistently with any sound principle, be held a ground of estoppel.

This sufficiently disposes of the case, and requires an affirmation of the decree complained of.

DECREE AFFIRMED.

NOTE.—See *Knell v. Codman*, 14 L. R. S., 806, and annotations as to agreements to pay money or give property after death of promissor.—*Reporter*.

Wytheville.

STEVENS v. McCORMICK.

JUNE 14th, 1894.

1. **PARTITION—*Interests of parties—Sale.***—An order for sale of land in partition before ascertaining the interests of the several parties, is premature and erroneous, as they are entitled to know how they stand in order that they may bid intelligently, if they desire to bid at the sale. *Horton v. Bond*, 28 Gratt., 815.
2. **IDEM—*Creditors.***—The creditors of the parties interested in the land are not proper parties in a partition suit.
3. **IDEM—*Commissioners.***—If from the facts in the record it appears that the land cannot be conveniently partitioned, there may be a decree for a sale, but it is not necessary that these facts shall appear from report of commissioners. *Zirkle v. McCue*, 26 Gratt., 532.
4. **APPEAL—*Decree of sale.***—Decree for sale of land in partition suit, though interlocutory, is appealable under Code, § 3454, as it requires change of title and possession, especially where it settles the principles of the cause.

Argued at Richmond. Decided at Wytheville.

Appeal from decree of circuit court of Clarke county, rendered May 18, 1893, in a suit for partition, wherein John W. McCormick and others were complainants, and John Stevens and wife and others were defendants. Opinion states the case.

Marshall McCormick, for appellants.

Moore & Kounslar, for appellees.

LEWIS, P., delivered the opinion of the court.

Opinion.

This was a suit for a partition or sale of a tract of land situate in Clarke county. The land was conveyed in 1854 to Nathaniel Burwell, Jr., for the benefit of Eliza M. McGuire, wife of D. H. McGuire, and her children during their joint lives, and at her death to be divided equally among the children and their issue. Mrs. McGuire died in 1856, having had ten children, all of whom survived her. Before the institution of the present suit several of the children died intestate and without issue. In 1859 one of the daughters, Lucy, intermarried with Treadwell Smith, Jr., by whom she had two children, and after his death she intermarried with John W. McCormick by whom, also, she had two children, and afterwards died. Her surviving husband and the two last mentioned children were the complainants in the court below. About the time of her first marriage she was paid by Nathaniel Burwell, Jr., over sixteen hundred dollars, which the appellants, who were defendants below, claimed was in full satisfaction of her interest in the trust estate, though it does not appear that any conveyance of her interest was ever made by her.

The circuit court determined that the land could not be conveniently divided, and without determining the extent of the interests of the several parties, but expressly reserving that question, ordered a sale, by the decree complained of.

1. The appellants contend, and we think with good reason, that it was premature and erroneous to order a sale before ascertaining the extent of the respective interests of the parties. When a sale takes place the parties are entitled to know exactly how they stand, in order that if they desire to bid for the land they may do so intelligently, and there is no reason that we can perceive why in such a case a similar rule should not be applied to that which prevails in respect to sales of land to satisfy liens; as to which see *Cole v. McRae*, 6 Rand., 644, and *Horton v. Bond*, 28 Gratt., 815, 822.

This rule applies with peculiar force to the present case, because here there is no question that Mrs. Smith received

Opinion.

from Burwell over sixteen hundred dollars; and while it does not distinctly appear that this was on account of her interest in the land in question, the inference from the record is very strong that it was; and if it was, then her interest was in effect extinguished, though she may have made no conveyance of her interest, and those claiming under her would have no standing in court as complainants in the present suit.

2. It appears that some of the parties in interest are indebted, though to what extent does not appear; and the point is made by the appellants that the creditors of these parties ought to have been brought before the court. But the rule is well settled otherwise. A partition never affects the interests of third persons, and hence creditors have no concern with it; and if they are made parties to the suit, it will be dismissed as to them. 2 Rob. (old) Pr., 14; *Wotten v. Copeland*, 7 Johns. Ch., 140; *Agar v. Fairfax*, 17 Ves., 533.

3. The question has also been raised as to the proper method of ascertaining in a suit for partition whether or not the land can be conveniently divided, the statute being silent on the subject. The appellants insist that the usual and correct practice is to appoint not less than five commissioners to go upon the land, any three of whom may act, and to report their views on the subject to the court. This was not done in the present case, but the matter was referred to a master, whose report was confirmed. In *Zirkle v. McCue*, 26 Gratt., 532, Judge Staples, speaking for the court, said that to warrant a decree for a sale, it must appear that partition cannot be conveniently made, and that the interests of the parties will be promoted by a sale, but that these facts need not appear from the report of commissioners, or by the depositions of witnesses. It is sufficient, he added, if the facts appearing in the record reasonably warrant the decree of sale. In other words, the matter of procedure is left to the discretion of the court.

4. Having thus reviewed the decree on its merits, it is hardly necessary to add that we do not agree with the appellees that

Opinion.

it is not an appealable decree. A decree of sale, as a general rule, contemplates, and, therefore, in the sense of the statute, requires, a change both of title and possession; and, besides, the decree in question settles the principles of the cause; so that upon both of these grounds the decree, although interlocutory in its nature, is an appealable decree. Code., sec. 3454; *Shannon v. Hanks*, 88 Va., 838.

The decree must, therefore, be reversed, and the cause remanded for further proceedings in conformity with this opinion.

DECREE REVERSED.

Wytheville.

CLINCH RIVER VENEER Co. v. KURTH.

JUNE 14th, 1894.

1. **DEED OF MARRIED WOMEN**—*Defective acknowledgment*.—Where certificate of acknowledgment to deed of a married woman in 1887, failed to state that she acknowledged the same to be her act, and that she willingly executed it: *held*, the deed is void.
2. **IDEM**—*Executory contract—Case at bar*.—Deed defectively acknowledged may not pass the legal title, but may be enforceable in equity as an executory contract, and will uphold a trust deed made on faith of it, especially where the one as to whom it is defective, makes no objection on that account and is ready to carry out her part of the contract and receive the money intended to be secured to her by the trust deed.
3. **TRUST DEED**—*Acknowledgment before trustee*.—A deed of trust acknowledged for recordation by the grantor before the trustee, is void.
4. **IDEM**—*Corporation—Creditors*.—A deed of trust executed by a corporation will inure ratably to the benefit of *all* its *then* creditors, except where it is executed to secure a debt contracted or money borrowed at the time of its execution. Code 1873, ch. 57, § 63.

Appeal from decree of circuit court of Washington county, rendered January 22, 1892, in a suit wherein the Clinch River Veneer Company and others were complainants, and Charles Kurth and others were defendants. The decree being adverse to the complainants, they appealed. Opinion states the case.

A. H. Blanchard, for appellants.

Fulkerson, Hurt & Page and *J. H. Wood*, for appellees.

LACY, J., delivered the opinion of the court.

Opinion.

This is the sequel of the case of the same name reported in 88 Va., 222, when the appeal on the part of the present appellants was dismissed as improvidently awarded.

It appearing that the decree of October 18, 1889, appealed from, was interlocutory only and did not settle any question in dispute in the cause, being a decree of reference only to a commissioner to make inquiry and report.

Upon the return of the cause to the circuit court this order was executed, report made and excepted to, exceptions overruled, and report confirmed by the court, and appeal taken to this court from said decree which was rendered on the 3d day of February, 1892; which overruled all exceptions to the commissioner's report, confirmed the said report, decreed the payment of the debts of the appellant company, and upon default for thirty days decreed the sale of its property, and appointed a special commissioner to execute the decree for a sale.

The object of the bill filed in the case by the appellant company was to annul the deeds under which the sale is decreed. 1st, Because the trust deed was executed by a company to prefer certain creditors, which is alleged to have been made by a joint stock company to pay a loan which should enure ratably to all the creditors. 2d, Because the deed to Miles' trustee on the 18th day of February, 1888, was void for uncertainties in the sum secured. 3d, To declare the deed to J. H. Wood void because not properly executed and recorded. 4th, To enjoin the collections under the deed, and to obtain priority for the the complainants by reason of priority in time by attacking the deeds first. The commissioner, whose report is the subject of controversy, to which the exceptions above mentioned were filed, makes a statement of the matters before him in substance as follows:

On December 20, 1886, W. W. James and M. J. James, his wife, undertook by deed to convey two parcels of land situated in Goodson, Washington county, Va., containing about six and one-half acres, adjoining each other, to F. W. and W. F.

Opinion.

Aldrich, in consideration of \$2,500, payable to M. J. James on or before thirty months after date, with interest payable semi-annually, for which they executed to her their bond, the land being her separate estate, and to secure which the said Aldriches were to execute a deed of trust conveying the land, and the buildings and machinery to be placed thereon. On the same day F. W. and W. F. Aldrich, W. W. James, Sr., and W. D. Jones and Joseph R. Anderson entered into a written agreement by which F. W. and W. F. Aldrich were to have the loan of the following sums of money, to be paid in the same way as that of Mrs. James, to wit: W. W. James loaned them \$500, W. D. Jones loaned them \$1,000, and Joseph R. Anderson loaned them \$500, for which they executed their bonds, payable on the same terms as that to Mrs. M. J. James. To secure all of these sums, including the sum to Mrs. M. J. James, they obligated themselves to execute a deed "to J. H. Wood, trustee, conveying the land bought of Mrs. James, and their engine or engines, &c., estimated to be of the value of \$10,000, now at Offuts, Tenn., but to be transferred by said F. W. and W. F. Aldrich to the said lands, &c."

The money thus loaned was to be paid by the parties loaning, to J. H. Wood, trustee, for the buildings and improvements to be made on her said land, as they might progress and be completed. On written orders from F. W. Aldrich to said trustee, the money loaned to be paid said trustee as the money was needed for constructing said buildings and making said improvements, and upon the completion of said buildings and improvements, and upon the arrival of said machinery upon said land, the balance of said loan should be paid through said trustee to the said F. W. Aldrich.

On the same day, December 20, 1886, said F. W. Aldrich and L. G. Aldrich and W. F. Aldrich executed a deed of trust to J. H. Wood, trustee, purporting to convey the property agreed to be conveyed, and for the purpose agreed on; that the deed from W. W. James and wife to F. W. and W. F. Aldrich

Opinion.

of date December 20, 1886, is void for not being acknowledged by her according to law, the certificate failing to show that she acknowledged the said writing to be her act, and further fails to show that she declared that she willingly executed the same. The acknowledgment being taken by Philip Rohr on January 15, 1887, and both of said deeds were recorded on January 17, 1887.

On July 23, 1887, F. W., L. G. & W. F. Aldrich executed a mortgage deed to said land, and all the machinery and improvements on the same, to John Keys, to secure him in the payment of \$1,000 due in twelve months from date received, August 11, 1888.

On May 19, 1887, Judge Kelly, judge of the circuit court, on motion of Aldrich and others, granted them a charter of incorporation by the name of the Clinch River Veneer Company.

On July 30, 1887, the said Aldriches, in consideration of \$20,000, conveyed said land with the buildings, &c., to the said company, which deed was admitted to record August 3, 1888.

On February 18, 1888, the said company conveyed to A. F. Miles, trustee, the same property to secure A. B. Echols as endorser of its notes, not to exceed \$3,000, acknowledged before the trustee therein, and therefore the acknowledgment was ineffective.

On October 24, 1888, the said company executed a trust deed to J. H. Wood, trustee, purporting to convey the said land and buildings and the machinery, except the veneering machinery belonging to W. A. Rader & Co., to Drake & Son, and that belonging to E. Godsey, subject to the deed to Miles, trustee, and the mortgages to Keys, both above mentioned, to secure stated debts; to secure first W. A. Rader as indorser to the National Bank of Bristol for \$2,000, and other named creditors.

On October 24, 1888, another trust deed to M. J. Drake to secure debts, which have been discharged.

Opinion.

On the 13th November, 1888, the company in consideration of \$1,000 executed a bill of sale to M. J. Drake, by which it, sold him certain logs and veneers at Big Cut, Foley Gap, surplus at Abraham's Falls, and the logs and veneers at Goodson, Va., after paying claim secured in the trust deed to him of October 24, 1888, recorded November 17, 1888.

The plaintiffs brought their suit April, 1889. In their bill they claim that the money secured in the deed of trust of December 20, 1886, by the Aldriches to J. H. Wood, trustee, except the \$2,500 due M. J. James, are not preferred debts, because not loaned said company until the spring of 1887.

That the deed to Miles' trustee is void for uncertainty, that the said company is a joint stock company and could not prefer one of its creditors to the prejudice of other creditors, except it be to secure a debt contracted or money lent at the time of the creation of the lien. Code of 1873, ch. 57, sec. 63.

The plaintiffs in their bill make no objection to the said deed of trust to J. H. Wood, trustee, of October 24, 1888, except to certain persons, to-wit: F. W. Aldrich, W. F. Aldrich, J. C. Tyler and M. J. Tyler, stockholders, and Taylor & King, and no objection to the mortgage to John Keys by said company of July 23, 1887.

At the time of the deed to J. H. Wood, trustee, of December 20, 1886, to secure the debts due W. W. James, Jos. R. Anderson, W. D. Jones and Mrs. James, the company had not been chartered, being incorporated May 10, 1887, and hence, if for no other, their objection for the reason stated could not prevail.

The deed to Miles, trustee, 18th of February, 1888, for the same reason, being subsequent to the date of incorporation, will inure ratably to all of the creditors existing at the time of the creation of the lien. The deed of trust not being executed to secure a debt contracted or money borrowed at the time of the creation of the lien.

And for the same reason the deed of trust to J. H. Wood,

Opinion.

trustee, of October 24, 1888, will inure ratably to all of the existing creditors anterior to that time, and this is true of all other creditors secured as well as W. A. Raslin.

Plaintiffs' counsel objected to the validity of the deed of trust executed by the Aldriches to J. H. Wood, trustee, of December 20, 1886, because the acknowledgment thereof was not taken in accordance with the form prescribed by the Code. This is a good objection as to Mrs. L. G. Aldrich, wife of F. W. Aldrich, but is not good as to W. F. and L. G. Aldrich. As to them there is a substantial compliance with the statute. That the title to the land in the suit has therefore never passed out of Mrs. M. J. James, she being a married woman and seized of the land in fee simple as her separate property. Her certificate of acknowledgment is defective, as has been said, because it does not state that she acknowledged the same to be her act, and that she has willingly executed the same as provided by the said Code of 1873. *Rorer's heirs v. Roanoke Nat. Bank*, 83 Va., 589, and cases cited.

But while the deed from M. J. James to F. W. and T. W. Aldrich, of date December 20, 1886, is defectively acknowledged and insufficient to pass the legal title to the land, the deed is good as an executory contract, and one a court of equity will enforce, and will uphold the deeds of trust executed on the faith of said deed, especially so inasmuch as Mrs. James, in her answer, is making no objection on that account, and is only anxious to carry out her part of the contract, and recover the money which the deed in trust of December 20, 1886, to J. H. Wood, trustee, was intended to secure her and the others therein named. 2 Minor, 344. The debts to said Drake have been paid and discharged in full by said trustee, as appears in evidence.

The said commissioner returned with his report an account showing the assets and the debts and their priorities in five classes. This report was excepted to by Echols, Rader, Reynolds, and Barker, because too much interest was allowed on

Opinion.

the debts of Mrs. James, W. W. James, Sr., and W. D. Jones, and as to the allowance of M. J. Drake because of the assignment of loss, &c., to Drake and his being a trustee; and Echols excepts to said debt of M. J. Drake of \$878 16 in the fifth class, because said money was made by said Drake while he was trustee and there is settlement of his transactions as trustee.

Mrs. James filed an amended answer, seeking to take advantage as far as may of the defective acknowledgment by her in deed referred to above.

W. W. James and W. D. Jones except because the acknowledgment to the deed of December 20, 1886, is reported to be defective.

The court sustained the exceptions, showing error in calculations of interest as stated, and recommitted the report, and reserved the question as to the priority of W. F. Rader, rejected the debt of Tavenier altogether, and in all other respects confirmed the report. The commissioner reformed his report according to the decree of the court, stated some new debts, and reported with new depositions to sustain the same. Which report was excepted to because not reported in accordance with the decree, because the commissioner would not report the J. D. Mitchell & Co. debt, and because he did report the Morey debt to be \$14,950, and because without authority he reported contrary to evidence a debt in favor of the National Bank of Bristol at \$193 03 instead of \$334 91, and renewed their old exceptions overruled by the court in former decree.

The court thereupon decreed as has been already stated, overruling all exceptions, confirmed the report, and decreed the payment of the debts therein reported, in their stated priorities, and decreed a sale upon default of payment in thirty days. Whereupon the appeal is taken to this court.

The decree appears to be without error, for reasons already stated by the commissioner and the trial court, and stated by this court herein, and must be affirmed. *Amer. & Eng. Encyl. of Law*, vol. 5, 439; *Carpenter v. Dexter*, 75 U. S., 8 Wall.,

Opinion.

426, 429, opinion of Mr. Justice Field; *Kelley v. Cobham*, 95 U. S. Rep., 544; *Cole v. Miller*, 8 Gratt., 413; *Haslen v. King*, 9 Gratt., 119, 6 Gratt., 645; *First Nat. Bank v. Trumbull*, 32 Gratt., 695; *Hardy v. Nor. Mfg. Co.*, 80 Va.

DECREE AFFIRMED.

NOTE.—As to validity of acknowledgment of a deed of trust before one who is the trustee, see *Rothschild v. Dougher*, 16 L. R. A., p. 719, and annotations thereon.—*Reporter*.

Wytheville.

SHIFLET v. DOWELL.

JUNE 14th, 1894.

1. **EJECTMENT—Verdict—Alteration.**—In action of ejectment jury found verdict for plaintiff for all the land claimed in his declaration. Judgment was entered thereon and the jury discharged. Defendant moved for a new trial. The court entered an order declaring it would grant a new trial unless plaintiff abated the verdict and took judgment for part of the land. Plaintiff abated as required: **Held:** The court had no power to make the order.
2. **IDEM—Statutory provision.**—In suits for money it is the practice of the trial courts to put plaintiff on terms to abate merely excessive amounts found by the jury, but not so in ejectment because of Code, § 2746, prescribing what the verdict for land shall be.

Argued at Richmond. Decided at Wytheville.

Error to judgment of circuit court of Greene county, rendered at its June term, 1891, in an action of ejectment, wherein James Dowell was plaintiff and Stinton Shiflet and wife were defendants. The judgment being adverse to them, they brought the case here on error. Opinion states the case.

James G. Field, for plaintiffs in error.

A. R. Blakey, for defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

Opinion.

The declaration charged that the said defendants unlawfully withheld from him, the said James Dowell, the possession of a tract of land in the county of Greene, in Virginia, containing 114½ acres, and described the said tract by metes and bounds. The defendants appeared and filed their plea of not guilty, and issue was joined thereon. A trial was had before a jury and a verdict rendered in favor of the plaintiff for the said tract of 114½ acres of land as follows: "We, the jury, upon the issue joined, find for the plaintiff that he is entitled to the whole of the land in the declaration mentioned, and that the defendants are guilty of unlawfully withholding from the plaintiff the possession of the tract of land in the declaration mentioned, and that the plaintiff has the fee simple title thereto. But we further find that the plaintiff is entitled to no damages for the timber cut and sold by the defendant from said land." Upon which said verdict the following order was entered: "Therefore it is considered by the court that the plaintiff recover of the defendant the possession of the tract of land in the declaration mentioned, and the fee simple title thereto, and his costs in this behalf expended."

The defendants moved the court to set aside this verdict, and grant to them a new trial, upon the ground that the said verdict is contrary to the law and the evidence. After the consideration of the said motion the court entered an order declaring that the said verdict was contrary to the law and the evidence, and that it would set the same aside and grant a new trial unless the plaintiff would abate the said verdict and take a judgment for three acres and one hundred poles of land, according to metes and bounds set out in the order of the court.

The plaintiff entered of record the abatement required by the court; whereupon the motion of the defendants, to set aside the verdict and grant to them a new trial, was overruled, and a judgment entered by the court against them for three acres and one hundred poles of land. To this action of the court the defendants excepted, and the case is here upon a writ of error.

Opinion.

This action of the court, in making a verdict for the jury after its discharge, was erroneous. There is no law giving this power to the court unless a trial by jury had been waived and the matters of law and fact had been submitted to the court; which was not done in this case. There is no analogy between the action of the court in this case and the admitted practice, in suits for money, of putting the plaintiffs upon terms to rebate merely excessive amounts found by the jury. In actions of ejectment, the statute prescribes the forms of pleading and the proofs required, and the form of the verdict which the jury shall return. "The verdict must specify such part of the land, particularly as the same is proved, and with the same certainty of description as is required in the declaration." Code of 1887, section 2746. Section 2747 prescribes what the verdict shall be when an undivided share or interest is found for the plaintiff. If there be a general verdict for the land claimed in the declaration, and the proofs show that the plaintiff is only entitled to an undivided share or interest, it will not be competent for the court to set aside this verdict and the judgment entered thereon, after the discharge of the jury, and then write a verdict for itself and enter a judgment upon it. In the case of *Hawley v. Twyman, trustee*, Judge Staples said, in the opinion of the court: "When a less or different estate from that stated in the declaration is ascertained to be in the plaintiff, it is very important that the verdict should, in express words, express what the estate is." 24 Gratt., 518.

The verdict and the judgment entered by the court are erroneous, and are set aside and annulled; and the case is remanded for a new trial.

JUDGMENT REVERSED.

Wytheville.

BLACKWELL V. LANDRETH.

JUNE 19th, 1894.

1. SLANDER—*Repetition—Evidence.*—Under plea of not guilty in action for defamation, the defendant cannot introduce witnesses to prove that they heard the same slander.
2. IDEM—*Verdict—Costs.*—In such action the trial court had no power to enter judgment for five dollars only, where the verdict was for that sum and costs, but if the verdict was irregular, it should have been set aside and a new trial awarded.
3. IDEM—*Inadequate damages—Case at bar.*—A verdict for five dollars and costs will be set aside as inadequate in action of slander of a girl of unblemished reputation by false imputations upon her chastity for the purpose of injuring an opposing candidate for office.

Error to judgment of circuit court of Wythe county, rendered at its March term, 1893, in an action for defamation of character, wherein Julia Blackwell was plaintiff and Robert Landreth was defendant. The judgment being unfavorable to the plaintiff, she brought the case here on error. Opinion states the case.

Walker & Caldwell, for plaintiff in error.

J. H. Fulton and *Robert Crocket*, for defendant in error.

LACY, J., delivered the opinion of the court.

This case is as follows: The plaintiff in error was a young girl, the adopted daughter of J. R. Harkrader, sheriff of

Opinion.

Wythe county, living in his family. The defendant, Robert Landreth, was a citizen of Wythe county, and a candidate for the office of sheriff of Wythe county at the election then approaching for the ensuing term. He circulated among the voters the statement that he had heard from his wife, who had it from a negro woman, that the said Julia had been delivered of a bastard child (had a baby), and it was laid to Harkrader or to his son-in-law, a young man living in his house, who had married his daughter, and that Julia had gone to Hufford's house, winding up with, "would you vote for such a man," adding, "I believe it is old Bob's" (meaning Harkrader). Witness told the defendant that he did not believe the report was true, but Landreth replied that it must be so; that witness did not repeat this slander, but in two weeks it was all over the county of Wythe. Landreth went to another house, where a little sister of Julia was cared for by the family, as Julia was at Harkrader's, and repeated it there, adding, as an anchor to windward to shield himself from responsibility in such a suit as this, "don't tell anybody, it is nigger news."

The slanderous words were admitted on the trial, and were entirely untrue, which so appearing to the voters, Harkrader was elected sheriff, and under the plea of not guilty, offered other persons to prove that they heard the same slander. This evidence was inadmissible; it is no excuse for him that others had heard the same rumor after he himself had set it going, with the caution "don't tell anybody."

If such evidence were allowed, the guilty party could always provide a safe shield for himself by sending the slander broadcast through the country. *Cheatwood v. Mayo*, 5 Munford, 16; Justice Parsons in 6 Mass. Rep., 518.

Upon principle, this question is too plain, however, to need citation of authority. *Dillard v. Collins*, 25 Gratt., 345. This evidence was improperly admitted against the objection of the plaintiff, to which she duly excepted, which was error on the part of the trial court.

Opinion.

The verdict was for \$5 and costs, the judge refused to set the verdict aside, and overruled the motion of the plaintiff to that end, but rendered a judgment for \$5 only and omitted the rest of the finding of the jury. This was error, the court's prerogative was not to find a verdict, that was the province of the jury. The court had the power only to set the verdict aside and order a new trial if it appeared right to it to do so, but not to change the verdict and then render judgment on it. The jury had not found a verdict for too little to carry the cost and so to enable the court to refuse judgment for costs, but for a certain sum and costs. If this was irregular the judge should have set it aside and granted a new trial. But the verdict ought to have been set aside on account of the amount of damages being too small. It is rare that a court will disturb a verdict on this ground, as has been fully set forth by this court in the late case of *Ward v. White*, 86 Va., 217. But this is one of those cases where the measure of damages is to be supported upon no just principal whatever. It is so palpably and grossly wrong as to shock the moral sense of every just man.

A young girl, a maiden of unblemished name and fame, is dragged into the polluted air of a municipal canvass, and her reputation and character ruthlessly assailed with false and slanderous assaults upon her virtue and chastity—all for the pitiful reward expected, to blast the good name of his opponent for office, and himself profit by the ruin thus accomplished.

That it has done her no permanent injury in her reputation, nor her adopted father either, and was stamped out by the truth coming to light, is no defence for him. His injury to this young girl was such as entitled her to damages, to exemplary damages not only on her account, but to punish the offender.

In such a case the appellate court will not interfere with the verdict of the jury, unless it appears that the verdict was plainly extravagant or excessive, which applies equally to an

Opinion.

unjust assessing of the damages too low, as to an intemperate excess. It is not until the result of the deliberations of the jury appears in a form calculated to shock the understanding, and implies no dubious conviction of their prejudice and passion, that the courts have found themselves compelled to interfere.

This is a striking illustration of this rule; a more striking can perhaps not be found. It is so obviously inadequate and unjust as to call for the interference of an appellate court. And we are of opinion to reverse the judgment with costs.

JUDGMENT REVERSED.

Wytheville.

RICHMOND & DANVILLE RAILROAD CO. v. YEAMANS.

JUNE 19th, 1894.

RAILROADS—*Accident at crossing—Case at bar.*—Plaintiff's horse had calmly approached defendant's train as it passed very close to him, and after it passed, having safely cleared the track, homeward bound, became frightened at the steam from the same engine on its return, and backed the wagon against the train, whereby plaintiff was injured. **Held:** Defendant not liable, as it could not foresee such unusual conduct on the part of the horse. *R. & D. R. R. Co. v. Yeamans*, 86 Va., 861.

Argued at Richmond. Decided at Wytheville.

Error to judgment of corporation court of Danville, in an action of trespass on the case wherein Thomas B. Yeamans was plaintiff and the Richmond and Danville Railroad Company was defendant. The verdict and judgment being for the plaintiff, the defendant brought the case here on writ of error and *supersedeas*. Opinion states the facts.

Charles M. Blackford, for plaintiff in error.

Peatross & Harris and *Staples & Munford*, for defendant in error.

LACY, J., delivered the opinion of the court.

This is a second appeal, and is the same case which is reported in 86 Va., at page 860, under the same name. At that

Opinion.

hearing, the corporation court was reversed, and the case remanded for a new trial to be had therein.

At the trial the same witnesses appear to have been examined for the plaintiff—the plaintiff, his son (a boy about fourteen years of age), and a colored driver on the other side of the track driving a wagon toward the track, a surveyor, and two witnesses from Danville—to prove that the place of the accident was within the corporate limits of North Danville.

The evidence for the plaintiff is about the same as that stated in the case in 83 Va., *supra*.

While the plaintiff stated at the first trial that he had crossed the track some feet when the engine started back, and this time that he had not cleared the track, yet I find that on cross-examination he had stated on the first trial that he had not cleared the track when the engine started, and the witness, Eddie Yeamans, adds this part of his statement. Yet it is the same case in substance. The horse and wagon of the plaintiff was not approaching the track as the train came back, but by the *concensus* of all the witnesses had crossed the railroad track and was going in the opposite direction when the train neared the crossing; and the collision was caused not by the train running over a wagon crossing the track, but by the horse backing the wagon against the train as it passed. There was no way by which the conductor of the train could foretell that this horse would reverse his action, instead of going on toward home on an unobstructed road, and go backwards upon this train, nor was there any way by which it could be anticipated that this horse, which had calmly approached the moving train as it passed very close to him, would become frightened at the steam from the same engine when it came back, especially as he was clear of the track homeward bound. It was one of those unexpected and unusual accidents which happen so seldom as not to be within the contemplation of ordinary minds. Few men have ever had such an experience, if any have; and few men, if any, would expect or anticipate any

Opinion.

such occurrence. It was not negligence, or lack of ordinary care or diligence, that it was wholly unforeseen, wholly unanticipated by everybody. I think now, as I thought at the first appeal, that there was no proof of any negligence on the part of the company. The instructions asked for by the defendant were all given, and I think the defendant was not hurt by any instruction given by the court on the motion of the plaintiff.

But the corporation court did err in overruling the motion of the defendant to set aside the verdict of the jury and grant a new trial. The plaintiff is not entitled to any recovery in this case against the defendant company. It has been so decided by this court in 83 Va., 860, *supra*. And the corporation court should have set aside the verdict, and ought to have granted a new trial to the defendant. Its refusal to do so was in disregard of the decision of this court in this very case, and for that reason the judgment of that court herein will be reversed and annulled, and the case remanded for a new trial to be had therein in accordance with this opinion, and not otherwise.

LEWIS, P., dissented.

JUDGMENT REVERSED.

Wytheville.

SAYERS v. SAYERS & AL.

JUNE 19th, 1894.

LIMITATION OF ACTION—*Maturity of obligation.*—Suit on note made payable on its face "one day after date out of proceeds of sale of furnace," not brought within five years after maker has realized from such sale more than enough to pay the note, *held*, barred by limitation.

Error to judgment of circuit court of Wythe county, rendered at its October term, 1892, in an action of debt, wherein S. R. Sayers was plaintiff and Robert Sayers and N. P. Oglesby were defendants. The judgment being adverse to the plaintiff, he brought the case here upon a writ of error. Opinion states the case.

Fulton & Fulton and *Robert Sayers, Jr.*, for plaintiff in error.

Walker & Caldwell, for defendant in error.

FAUNTLEROY, J., delivered the opinion of the court.

Prior to the 5th day of March, 1881, Robert Sayers, S. R. Sayers, and N. P. Oglesby were joint and equal owners of an iron furnace in Wythe county, Va., and were partners in the manufacture of charcoal pig-iron, under the firm name of Sayers, Oglesby & Co.; and said firm engaged likewise in merchandizing. On the 5th day of March, 1881, the said firm discontinued the business of making iron; and, on a settle-

Opinion.

ment, it was ascertained that S. R. Sayers was in advance to the firm of Sayers, Oglesby & Co. to the amount of \$2,681 55; of which sum Robert Sayers owed \$944 80, and N. P. Oglesby \$1,736 75. To close up this settlement, the instrument sued on in this case was made and signed, as follows:

"One day after date we promise to pay Samuel R. Sayers two thousand six hundred and eighty-one dollars and fifty-five cents, value received of him, being the amount overpaid by him in the settlement of Sayers, Oglesby & Co.'s matters, as per statement made this day, and papers filed with statement. It is agreed and understood that Robert Sayers has to pay to Samuel R. Sayers \$944 80, and Nicholas P. Oglesby has to pay to said Samuel R. Sayers \$1,736 75; and that Samuel R. Sayers agrees that the said amount shall be paid out of the proceeds of the furnace. Witness our hands, this 5th day of March, 1881.

"ROBERT SAYERS,

"N. P. OGLESBY."

In August, 1890, S. R. Sayers brought this action of debt on this note given by Robert Sayers and N. P. Oglesby, dated the 5th of March, 1881, and due one day after date. The defendants pleaded that the cause of action did not arise in five years before the suit was brought; to which the plaintiff replied generally, and the court, to whom the matter was referred upon facts agreed, gave judgment for the defendants. This writ of error is to the said judgment; and the question presented to this court is: When did the cause of action arise on the promissory note sued on, and dated March 5, 1881, and payable one day after date, as aforesaid?

Soon after the note sued on was executed, a chancery suit to sell the furnace and real estate belonging to the firm for partition, resulted in a decree for sale; and it was sold under the decree of the court for the price of \$21,000; one-fourth cash, and the balance in three equal annual instalments, with inter-

Opinion.

est. At this sale N. P. Oglesby, James Crockett, J. W. Robinson, and D. P. Graham became the purchasers—each one-fourth. Thus N. P. Oglesby was both seller and buyer. Immediately after this sale and purchase James Crockett, N. P. Oglesby, D. P. Graham, and M. B. Tate entered into a partnership and carried on business at the said old stand under the firm name of Crockett & Co. The purchase-money notes of these purchasers were paid off by the new firm as they fell due, the last being paid December 5, 1885, and the first having been paid off March 11, 1882. In making his payments on these purchase-money notes N. P. Oglesby paid no money, but gave receipts for the one-third of the proceeds of the sale coming to him, and took credit on the purchase-money notes held by the commissioner of sale.

The note sued on was due on its face one day after date, March 5, 1881, and though made payable out of the proceeds of the furnace, more than enough was realized by N. P. Oglesby out of the cash payment, and the first deferred instalment of sale money, to pay the debt sued on; and the cause of action arose on the 11th of March, 1882, when the first note was paid off. The said N. P. Oglesby realized out of the proceeds of sale of the furnace about \$1,500 in cash payment, and out of the first instalment of deferred payment, March 11, 1882, about \$1,850, more than enough to pay the whole of the note in controversy. It is true that he received the greater part of this sum in credit upon his purchase-money note for the property of which he was a buyer, as well as a seller; but that was proceeds of the sale of the furnace. The whole of the purchase money at commissioner's sale was due March 5, 1885, and this suit was not brought until August, 1890, more than five years after the cause of action on the note sued on arose.

The promise to pay is expressly one day after date of March 5, 1881, and though made payable out of a particular fund, the realization of that fund was within the control of Oglesby,

Opinion.

the promisor. *McDowell v. Goodwin*, 12 Amer. Dec., 685; *Cobb v. Fountaine*, 3 Rand., 484.

The cause of action arose more than five years before the suit was brought, and the circuit court did not err in the judgment complained of, which is affirmed.

JUDGMENT AFFIRMED.

Wytheville.

SMITH v. COMMONWEALTH.

JUNE 19th, 1894.

1. CRIMINAL PROCEEDINGS—*Witnesses—Competency*.—At trial of one of two jointly indicted but electing to be separately tried, the other accused and his wife are competent to testify against the one on trial: Code, § 3900.
2. APPELLATE PRACTICE—*Demurrer to evidence*.—This court will consider an assignment of error in the court below overruling motion for a new trial in the light of a demurrer to evidence, when not the facts but the evidence is certified.

Error to judgment of circuit court of Franklin county, rendered May 10, 1893, at the trial of an indictment of Peter Smith for murder of Milly Sloan, whereby the plaintiff in error was sentenced, in accordance with the verdict, to imprisonment for a term of eighteen years in the penitentiary. Opinion states the case.

Dennis & Saunders, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

FAUNTLEROY, J., delivered the opinion of the court.

The record presents the following case: A special grand jury for the county of Franklin, at the March term, 1893, of the county court of said county, found a joint indictment

against Peter Smith and Commodore Sloan for murder. When arraigned Peter Smith elected and demanded to be tried in the circuit court of Franklin county, and to that court the case was removed. It was called for trial in the said circuit court May 10, 1893, and the accused, Peter Smith and Commodore Sloan then elected to be tried separately. Smith pleaded "not guilty," upon which issue his trial proceeded, and the jury returned the following verdict: "We, the jury, find the prisoner, Peter Smith, not guilty of murder in the first degree, but guilty of murder in the second degree, as charged in the indictment, and fix the term of his confinement in the penitentiary at eighteen years." Upon this verdict the judgment of the court was entered according to the verdict. There are three bills of exceptions taken by the prisoner.

The first error assigned, is that, upon the trial of Peter Smith, the wife of Commodore Sloan, who was jointly indicted with Smith, but had elected to be tried separately, was allowed to testify as a witness for the commonwealth.

There was no error in this. She was a competent witness, and the jury could estimate the credibility and worth of her testimony.

The second error assigned is that Commodore Sloan, jointly indicted with Peter Smith for the felonious assault upon and murder of Milly Sloan, and against whom prosecution was then pending, was allowed to testify for the commonwealth upon the separate trial of Peter Smith.

This was not error. "No person who is *not jointly tried* with the defendant shall be incompetent to testify in any prosecution by reason of interest in the subject matter thereof." Section 3900, Code of Virginia, 1887.

Accomplices in the same crime are competent witnesses for the commonwealth. *Byrd v. Commonwealth*, 2 Va. Cases, 490; 2 Robinson's (old) Practice, 214.

The third and last error assigned is the overruling of the motion of the prisoner to set aside the verdict and to grant to

Opinion.

him a new trial, on the ground that the verdict is contrary to the law and the evidence. The *evidence* is certified, and not the *facts* proved; therefore, this assignment of error must be considered by this court as a demurrer to the commonwealth's evidence. The coroner's inquest, and the testimony of nine intelligent, respectable, unimpeached, and uncontradicted witnesses upon the trial, attest a wanton, unprovoked, cruel, and brutal murder of a helpless old woman; and the plaintiff in error, Peter Smith, has been found guilty of that murder, by a jury of his peers, at a trial conducted and presided over by an able, conscientious, careful, and learned circuit judge, who refused to set the verdict of the jury aside, and pronounced the judgment complained of; and this court, upon a careful review of the evidence and the whole trial in the circuit court, finds no error in the record, and affirms the judgment of the circuit court of Franklin county.

JUDGMENT AFFIRMED.

Wytheville.

ETTER v. SCOTT.

JUNE 19th, 1894.

1. JUDICIAL SALES—*Purchasers—Account of liens.*—Purchasers under decree should not be required to take or pay for the property where it had been thrice sold without an account of liens and the title is uncertain.
2. IDEM—*Rents and profits.*—Where the bill fails to allege, and it is not proved, that the rents and profits will not within five years discharge the liens: *held*, error to decree sale.
3. IDEM—*Previous sale.*—Purchasers at such sale should not be compelled to complete their purchase where the land has been previously sold in another suit, and neither the sale nor the decree therefor has been set aside.
4. IDEM—*Sale commissioner.*—Owner of half of the judgment, to satisfy which the suit is brought to sell land, *held* incompetent to act as commissioner to sell.

Appeal from two decrees of circuit court of Wythe, rendered at its September term, 1890, in the chancery causes styled Scott against Scott, and Painter against Scott, heard together. The decree being adverse to certain parties thereto, to wit: James A. Etter and G. R. Vaught, partners as Etter & Vaught, they appealed. Opinion states the case.

James A. Walker and H. D. C. Buford, for appellants.

J. H. Fulton and C. B. Thomas, for appellees.

FAUNTLEROY, J., delivered the opinion of the court.

Opinion.

The record in this case is compiled in such a confused manner, that the matter in controversy is arrived at with great difficulty.

The first step in the proceedings to be reviewed, was a bill filed at the August rules, 1884, by J. F. Scott against William M. Scott, charging that J. F. Scott had paid for William M. Scott, as his security, a judgment obtained by W. R. Horne against William M. Scott and J. F. Scott, which, at the time of payment, December 11, 1882, amounted to \$346 88; that William M. Scott owned one acre of land, in Wythe county, upon which there was a still-house; that the said judgment, which he had paid as security for William M. Scott, was a lien on this land; and prayed for a sale of the land to satisfy the judgment assigned to him. The bill was taken for confessed, and at the September term, 1884, a decree was rendered to sell the said house and lot of the defendant, William M. Scott, without directing an account of liens, or the order of their priority, and appointing C. B. Thomas a special commissioner to make the sale. The said commissioner, Thomas, proceeded to sell the said house and land, on the 18th of November, 1884, and G. R. Vaught became the purchaser, at the price of \$680, which sale and purchase was duly reported to the court, whereupon an upset bid was accepted from Eli C. Hale, of \$900. No report is filed in the cause to show what was done, but a decree was entered at the September term, 1885, giving to James A. Etter the right to put in an upset bid of \$1,000, but saying that the sale to said Hale, for the sum of \$900, shall stand, unless James A. Etter complies with the terms of the decree allowing him to advance the bid \$100. Whether Etter ever complied with the terms of this decree, does not appear; but, on the 8th of February, 1886, the said commissioner again offered the land for sale, and sold it to J. A. Etter and G. R. Vaught for the price of \$1,000. This sale was confirmed at the March term, 1886; the said purchasers paying a small cash payment, and executing their notes, at six, twelve,

Opinion.

and eighteen months for the deferred instalments, with security. By the same decree, C. B. Thomas was directed to collect the said purchase-money bonds as they became due, and W. H. Bolling was appointed a commissioner to take an account of liens. This is the first order directing an account of liens, and this order was never executed. Receiver Thomas sued and obtained judgment for the purchase money, with interest and cost, aggregating \$948 40. A *fi. fa.* on this judgment was returned, no property.

At the August rules, 1887, J. L. Painter filed his bill against William M. Scott to enforce the lien of a judgment in his favor which he had recovered on the 18th of March, 1875, for \$192 50, with interest and costs. His bill avers that his said judgment is unpaid, and that one-half of it has been assigned to F. S. Blair; that the judgment debtor, William M. Scott, has no personal property; but that his said judgment is a lien upon the tract of land theretofore sold by C. B. Thomas, commissioner in the cause of Scott against Scott, to J. A. Etter and G. R. Vaught for the price of \$1,000, of which sum they still owe the commissioner \$900, with interest; that the plaintiff is entitled to condemn the said land for the satisfaction of his prior lien; and that the sale made by Commissioner Thomas to Etter and Vaught has never been complied with and is null and void. This bill was taken for confessed; and, at the September term, 1887, it was decreed that J. A. Etter and G. R. Vaught should, out of the unpaid purchase money due from them to C. B. Thomas, receiver in the cause of Scott against Scott, pay the Painter judgment, set out in the bill, one-half to complainant and one-half to F. S. Blair; in default of which F. S. Blair was appointed a commissioner to sell the land. At the same term of the court a decree was entered in the cause of Scott against Scott appointing C. B. Thomas a receiver, and ordering him to proceed, by suit or otherwise, to collect the purchase money due from Etter and Vaught. Thus rendering two decrees at the same term against the said Etter and Vaught

Opinion.

for the said purchase money, in favor of different parties, and no account of liens to enable them to know and to act intelligently as to whom they should pay.

On the 14th of November, 1887, F. S. Blair, commissioner, judgment creditor, and plaintiffs' attorney, all in one, sold the land, and J. A. Etter became the purchaser for the price of \$400; which sale was confirmed at the March term, 1888, and F. S. Blair was directed to collect the deferred instalments of the purchase money. At the December term, 1888, a decree was entered in the cause of Painter against Scott, releasing Etter and Vaught from their purchase of the land from C. B. Thomas, commissioner in the cause of Scott against Scott, and reciting that Etter had complied with the terms of the sale made to him by Blair, commissioner, and authorizing him to sue out a writ of possession; but at the same term this decree was set aside.

At the March term, 1889, the two causes of Scott against Scott, and Painter against Scott, were, for the first time, heard together; and on the motion of Eli Hale, leave was given to supply lost papers in the cause of Scott against Scott; and an order was entered setting aside both the sales theretofore made, and appointing W. E. Fulton, a commissioner, to take an account of liens.

At the September term, 1889, Eli C. Hale, C. B. Thomas, commissioner in Scott against Scott, and James F. Scott, filed a petition to rehear the decrees in the cause of Painter against Scott, rendered at the September term, 1887, and the decree rendered in the two causes heard together at the March term, 1889. They also ask that the decree setting aside the two former sales, be set aside, and all subsequent decrees thereto, and that Etter and Vaught be decreed to pay the balance of the money due on their purchase.

The report of William E. Fulton, commissioner of account of liens, was never confirmed, and is lost, and no copy is found in the papers. At the March term, 1890, J. A. Etter and G.

Opinion.

R. Vaught filed their petition, in which they set out all the proceedings had in the two causes of Scott against Scott, and Painter against Scott, and aver that, owing to the loss of the papers in the cause of Scott against Scott, they had been unable to know how the matter of the sales of the land actually stood; that no account of liens was ever taken before the sales were made, and the rights of creditors were unsettled; that from the loss of papers, and the fact that a second sale was decreed in the cause of Painter against Scott, they supposed that the previous sales were annulled and the purchasers released from their obligations thereunder; that owing to the long and entangled litigation the title to the property was unsettled and unsafe; and they prayed that the previous sales be declared off, and that accounts be taken, and for general relief. At the September term, 1890, the court dismissed their said petition, and decreed that they shall pay the balance of their purchase money under their purchase from C. B. Thomas, commissioner in the cause of Scott against Scott. From this decree they appeal.

The court erred in requiring the said Etter and Vaught to pay for the property, and take it as purchasers under a decree for sale rendered in the cause of Scott against Scott, when no account of liens was ever ordered or taken until the land had been sold three times, and the sale to them had been confirmed. And the account then ordered was never taken, and no information as to the liens or their priorities had ever been before the court in any manner. There is no allegation in the bill in either cause, and no information or evidence before the court that the rents and profits of the lands would not pay the liens in five years. In *Horton v. Bond*, 28 Gratt., 815, it is decided that "before there can be a decree for sale of land it must be made to appear, by the pleadings, by the admissions of the parties, by evidence or by report of a commissioner on inquiry ordered, that the rents and profits will not pay the judgment." See *Evarts v. Sanders*, 25 Gratt.; *Effinger v. Kenney*, 79 Va.

Opinion.

The sale made by Commissioner Blair in the cause of Painter against Scott has never been set aside, nor has the decree under which he made the sale been set aside. The purchaser at that sale was J. A. Etter, for the price of \$400, while the purchasers at the sale made by C. B. Thomas, commissioner in the cause of Scott against Scott, were Etter & Vaught for the price of \$1,000. This alone constitutes a cloud upon the title which should be removed. It was error in the cause of Painter against Scott to appoint F. S. Blair, who was assignee and owner of one-half of the debt claimed in the bill, the commissioner to sell. His interest made him incompetent to act as commissioner of sale.

The whole proceedings are irregular and erroneous, from the first decree in the cause of Scott against Scott; and the appellants ought not to be compelled to pay their money and take a title beclouded by the errors and irregularities of the court caused by the judgment creditors in the conduct of their suits. The rights and interests of all parties demand that the whole proceedings in both causes be set aside, back to the bills, and the causes ordered to be properly matured, account of liens directed and taken, and such decree rendered as the evidence shall show to be proper.

DECREES REVERSED.

Wytheville.

TENCH v. ABSHIRE.

JUNE 19th, 1894.

1. APPELLATE PRACTICE—*Evidence not certified—Roads.*—On appeal from judgment of circuit court affirming judgment of county court confirming report of viewers in proceedings to open a road, awarding one dollar for the taking of half an acre of land, where the evidence is not certified: *held*, such will be presumed to be the value of the land taken.
2. ROADS—*Report of viewers.*—Viewers' report in proceedings to establish a road need not state width and grade of the road, especially where a diagram is returned with the report.
3. IDEM—*Notice to land-owners—Appearance.*—Where all parties interested in the establishment of a road are either notified or appear and waive notice, no objection for want of notice can be made.
4. IDEM—*Location of gates.*—Where order establishing road provides that the applicant shall erect and maintain gates at every point at which the road crosses the land owner's fence, such order is not defective for want of particularity.

Error to judgment of circuit court of Franklin county, rendered May 19, 1893, affirming a judgment of the county court of that county, in a proceeding wherein J. L. Abshire was plaintiff and Salina A. Tench and others were defendants, the object of which proceeding was the establishment of a road, under chapter 43 of the Code. Opinion states the case.

P. H. Dillard, for appellant.

E. W. Sanders, for appellee.

LEWIS, P., delivered the opinion of the court.

Opinion.

1. The first objection is that the sum allowed the appellant for the land actually taken is inadequate; It seems that the land so taken did not exceed one-half acre, and the sum allowed was one dollar. The appellant being dissatisfied with the report of the viewers, commissioners were appointed to assess the damages, under section 951 of the Code, who agreed with the viewers as to what was a just compensation, and their report was confirmed. An appeal was thereupon taken to the circuit court, and the judgment of the county court affirmed. The evidence is not certified, and in this condition of the record we must presume that the sum awarded was adequate.

2. The next point is that the report of the viewers ought to have been quashed, because the width and grade of the proposed road is not given, and because no map or diagram was returned with the report. In point of fact a diagram was returned with the report, which appears in the transcript; nor is there any requirement of the statute that the width and grade of the road shall be stated in the report. The second objection, therefore, like the first, is untenable.

3. So, also, is the third, viz: That notice was not given to the proprietors and tenants of the lands on which the road was established, as required by section 949 of the Code. The appellant herself had notice, and appeared and contested the application; and the other proprietors and tenants afterwards came into court, and waived notice, which is all that need be said on this point.

4. The fourth and last assignment of error is as follows: "The order establishing the road is erroneous in this, also: that it is incomplete, and leaves petitioner (the appellant) absolutely in the power of her adversary. He is to open the road, and erect necessary gates to be determined upon by himself." "Now where," it is asked, "is he to put these gates?" This question is answered by the order itself, which provides that the appellee shall erect and maintain gates at every point at which the road crosses a fence of the appellant.

Opinion.

It is needless to say more. Enough has ben said to show that the points made by the appellant are not only untenable, but frivolous.

JUDGMENT AFFIRMED.

NOTE BY REPORTER.—For a discussion of the question of the constitutional right to condemn lands for private roads, see note to case of *Hatch County v. Peterson* (Idaho), 16 L. R. A., 81.

Wytheville.

GRANT v. SUTTON.

JUNE 19th, 1894.

1. HUSBAND AND WIFE—*Common law—Earnings.*—At common law marriage is an absolute gift to the husband of all the wife's personal estate, including her earnings, which did not become her separate estate until May 1, 1888, and property purchased before that time with her earnings is subject to her husband's debts. *Yates v. Law*, 86 Va., 120.
2. *IDEM—Separate estate—Burden of Proof.*—Where wife has during coverture purchased property, she must show that it was purchased with her separate estate, in order to protect it from her husband's creditors.

Appeal from two decrees of circuit court of Washington county, rendered October 15, 1891, and January 20, 1892, in a chancery cause wherein John F. Sutton was complainant and Mrs. Martha G. Grant was defendant. The decree being adverse to her, she appealed. Opinion states the case.

D. Trigg, for appellant.

Fulkerson, Page & Hurt, for appellee.

LEWIS, P., delivered the opinion of the court.

This was a suit to subject certain real estate, standing in the name of the appellant, Mrs. Martha G. Grant, to the satisfaction of three judgments against the complainant, John F. Sutton, as the endorser of H. M. Grant, the husband of the appellant, which judgments had been paid by the complainant.

The bill states that the real estate in question, or the money with which it was purchased, was given to the appellant by her husband, who was insolvent, and that the same is liable to the satisfaction of the judgments. In denial of this allegation the answer of Mrs. Grant avers "that during her married life, a period of about twenty-five years, she has been frugal, industrious, and saving; that she has managed for some years past to save a sufficiency from her extraordinary exertions to help her husband, who, some years ago, met with great financial reverses, and to pay for her home, which is sought to be subjected to sale in this suit."

The circuit court, after depositions had been taken, decreed in favor of the complainant, but held Mrs. Grant entitled to a prior lien on the property amounting to \$229 11.

It is a principle of the common law, which has been repeatedly recognized by this court, that marriage is an absolute gift to the husband of all the personal estate of the wife of which she is beneficially possessed in her own right at the time of the marriage, or which may come to her during the coverture, including her earnings, or the products of her skill and labor. *Campbell v. Bowles*, 30 Gratt., 652; *Yates v. Law*, 86 Va., 117. And the rule has been declared that purchases of property made by the wife of an insolvent debtor during coverture are regarded with suspicion, unless it clearly appears that the consideration was paid out of her separate estate; and that in a contest between her and creditors of the husband, the *onus* is upon her to overcome the presumption which the law in such a case raises against her. *Yates v. Law*, *supra*.

This the appellant has not done in the present case. There is no proof that she had any separate estate, or that the money with which the property in question was paid for was derived by her from a source other than her husband. The evidence, it is true, tended to show that sometime in the year 1881, after the debts upon which the judgments were obtained had been contracted, and after the insolvency of her husband, she opened

Opinion.

an account with F. B. Hurt & Co., of Abingdon, which continued for a number of years, during which time she made deposits of money with the said firm, through whom the payments for the property in question were made; and the averment of the answer is that this money was "saved from her extraordinary exertions," and that she is entitled to it as her separate estate.

But there is a two-fold answer to this proposition, viz: (1) that the evidence does not show distinctly, what sums were deposited by her, and that it does show that during the same period deposits were made with the same firm by her husband, which were placed to her credit, and blended with her account; and (2) that under the original married woman's act of 1877, the sources whence a separate estate of a married woman, not a sole trader, could be derived, were these only, viz: "gift, grant, purchase, inheritance, devise or bequest"; and that it was not until the enactment of the present Code, which took effect on the 1st of May, 1888, after the date of the transactions in question, that to the sources above mentioned were added the words: "or in any other manner whatever"; so that the present case, in this particular, is governed by the rule of the common law which entitles the husband absolutely to the wife's earnings; for there is no averment in the answer that the appellant was a sole trader.

It also appears by the evidence that for a number of years before the death of the appellant's husband, he enjoyed a large, and presumably a lucrative, practice as the leading dentist of Abingdon; and the fair inference from the record is that the whole net earnings of his business, which he carried on as *agent for his wife*, went into the purchase of the property in question.

The appellee complains of the allowance to the appellant of the item of \$299 11, which was declared a first lien on the property, paramount to the judgments. As to this, the court adopted the conclusion of the commissioner to whom the mat-

Opinion.

ter was referred; and upon examination of the record, we are of opinion to affirm the action of the lower court.

DECREE AFFIRMED.

NOTE BY REPORTER.—As to legislation changing estates created by marriage, see Illinois case of *McNeer v. McNeer*, 19 L. R. A., 258.

Staunton.

RICHMOND CITY & SEVEN PINES RAILWAY CO. v. JOHNSON.

SEPTEMBER 13th, 1894.

COMMON LAW PRACTICE—*Nil debet*—*Payment*.—Under plea of *nil debet* defendant cannot introduce evidence of payment or setoff, unless such payment or setoff be so plainly and particularly described in an account filed therewith, as to give plaintiff notice of its nature.

Argued at Richmond. Decided at Staunton.

Error to judgment of circuit court of the city of Richmond, rendered December 2, 1891, in an action of debt wherein A. L. Johnson, defendant in error here, was plaintiff, and the Richmond City and Seven Pines Railway Company was defendant. Opinion states the case.

F. M. Conner and *Benj. H. Nash*, for plaintiff in error.

W. C. Preston and *Meredith & Cocke*, for defendant in error.

LEWIS, P., delivered the opinion of the court.

This was an action of debt on a written order drawn by one Child on the defendant company, payable to the plaintiff, for two thousand dollars, and accepted by the company. The plea was *nil debet*, and there was a verdict and judgment for the plaintiff.

The single question in the case is as to the exclusion at the

Opinion.

trial of certain evidence offered by the defendant. It appears that the company contracted with Child to build its road from a point within the city of Richmond to its eastern terminus, about seven miles outside of the city. Child sub-let the work to Thos. Barry & Co., and employed the plaintiff, a civil engineer, to locate the road and to supervise its construction.

At the trial the defendant offered evidence to prove that the order was given and accepted to pay for work done by Barry & Co., and that the defendant afterwards paid Barry & Co. for the work. But the evidence was excluded; to which ruling the defendant excepted.

It is contended that the evidence ought to have been admitted, because, under the plea of *nil debet*, payment or any other defence is admissible that tends to deny an existing debt; and this is undoubtedly so at common law. 4 Min. Insts., 641; *Va. Fire & Marine Ins. Co. v. Buck & Newson*, 88 Va., 517. But this rule, so far as respects the defence of payment, has been modified in Virginia by statute.

In 1705 it was enacted by the general assembly that "when any suit shall be commenced and prosecuted in any court within this colony for any debt due by judgment, bond, bill or otherwise, the defendant shall have liberty upon tryall thereof to make all the discounts he can against such debt, and upon proof thereof the same shall be allowed in court." 3 Hen. St., 378. Under this act it was the practice to allow off-sets to be given in evidence under the plea of *nil debet* or *non assumpsit*, and this without previous notice. 5 Rob. Pr., 1000; 2 Tuck. Comm., 108. But at the revisal of 1819 a change was made, in regard to both payment and off-sets, by enacting that "in every action in which a defendant shall desire to prove any payment or set-off, he shall file with his plea an account, stating distinctly the nature of such payment or set-off, and the several items thereof; and on failure to do so, he shall not be entitled to prove before the jury such payment or set-off, unless the same be so plainly and particularly de-

Opinion.

scribed in the plea as to give the plaintiff full notice of the character thereof." 1 R. C. (1819), p. 510.

Under this statute it was held in *Johnson v. Jennings*, 10 Gratt., 1, that in the absence of such an account as the statute contemplated, evidence was not admissible to prove a specific payment under the plea of *non assumpsit*; and the statute, as it now stands in the Code, is, in this respect, substantially the same as it was in the Revised Code of 1819. It enacts that "in a suit for any debt, the defendant may at the trial prove and have allowed against such debt any payment or set-off which is so described in his plea, or in an account filed therewith, as to give the plaintiff notice of its nature, but not otherwise." Code (1887), sec. 3298.

It will thus be seen that, as respects notice, the statute, as was said by Moncure, P., in *Allen v. Hart*, 18 Gratt., 722, 734, puts payment and set-off on the same footing; so that to entitle the defendant to prove payment under the plea of *nil debet*, he must file with his plea such a descriptive account as section 3298 requires. 1 Bart. Law Pr. (2d ed.), 492, 498.

This requirement not having been complied with in the present case, the evidence in question was rightly excluded; and as there is nothing in the record to warrant a new trial on the ground that the verdict was contrary to the evidence, it follows that the judgment must be affirmed.

JUDGMENT AFFIRMED.

Staunton.

WESTERN UNION TELEGRAPH CO. v. BRIGHT.

SEPTEMBER 13th, 1894.

1. CONSTITUTION—*Code*, § 1292.—That section providing that for every failure of a telegraph company to deliver or forward a dispatch as promptly as practicable, the company shall forfeit one hundred dollars to the person sending the dispatch, or to the person to whom it was addressed: *held*, not repugnant to the constitution of the United States. *W. U. T. Co. v. Tyler*, *ante*, p. 297.
2. CIRCUIT COURTS—*Motion to recover forfeits*.—Said courts have no jurisdiction of motions to recover forfeits specified in § 1292, as § 3211 authorizes the remedy by motion only in cases where plaintiff is entitled to recover money on action or a contract, and the proceeding to recover such forfeit is founded, not upon a contract, but upon a tort; *i. e.*, a wrongful violation of a public duty. *W. U. T. Co. v. Pettijohn*, 88 Va., 298.
3. *IDEM*—*Special powers—Record—Dismissal*.—Where a court acts under special powers, it has only the jurisdiction expressly delegated, and it must appear from the record that its acts are within its jurisdiction; and the court will dismiss the case at any time when the fact is brought to its notice.

Argued at Wytheville. Decided at Staunton.

Error to judgment of circuit court of Franklin county, rendered October 26, 1892, in a proceeding by motion wherein George M. Bright was plaintiff, and the Western Union Telegraph Company was defendant. The judgment being adverse to the defendant company, it obtained a writ of error from one of the judges of this court. Opinion states the case.

Robert Stiles, for plaintiff in error.

Opinion.

Anderson & Hairston, for defendant in error.

LEWIS, P., delivered the opinion of the court.

This was a motion in the court below to recover a penalty of \$100, provided by section 1292 of the Code, for the failure of the defendant company to deliver as promptly as practicable a certain dispatch transmitted from Abingdon to Rocky Mount (points within this State), and addressed to the plaintiff. Section 3211, under which the proceeding was had, enacts that "any person, entitled to recover money by action under a contract, may, on motion before any court which would have jurisdiction in an action, otherwise than under section 3215, obtain judgment for such money after fifteen days' notice, which notice shall be returned to the clerk's office of such court ten days before the commencement of the term," etc.

The defendant company appeared and moved to dismiss the motion, on the ground, among others, that the circuit court had no jurisdiction to entertain it, which motion was overruled; and all matters of law and fact having been submitted to the court, judgment was given for the plaintiff.

1. The point was also made, and is repeated in the petition for appeal, that section 1292 of the Code is repugnant to the commerce clause of the constitution of the United States. But the point, while sufficient to give this court jurisdiction of the case, although the matter in controversy is less in amount than \$500, is not well taken. The dispatch in question was a private domestic dispatch, and, therefore, not within the purview of the federal constitution; for the rule is well settled, as declared by the Supreme Court of the United States in *Telegraph Co. v. Texas*, 105 U. S., 460, that the regulation of such dispatches belongs exclusively to the State in which they are transmitted as does the regulation of interstate commerce to congress; nor does the fact that the defendant company also does an interstate business, and is, therefore, an instrument of interstate com-

Opinion.

merce, affect the case. *Leloup v. Port of Mobile*, 127 U. S., 640, 647; *West. Union Tel. Co. v. Alabama*, 132 *Id.*, 472; *Postal Tel. Cable Co. v. Charleston*, 158 *Id.*, 692.

In the recent case of *West. Union Tel. Co. v. Tyler*, *ante*, p. 297, decided since the present appeal was taken, it was held that section 1292 is valid, even as applied to a dispatch sent from another State, in the absence of any conflicting regulation on the subject by congress; and to that ruling, without restating the reasons upon which it was founded, we adhere.

2. But that the circuit court was without jurisdiction to entertain the motion is, we think, clear. Section 3211 authorizes the remedy by motion only in those cases in which the plaintiff is entitled to recover money by action on a contract; and here the proceeding is founded, not upon contract, but upon a tort—*i. e.*, a wrongful violation of a public duty. The case of *West. Union Tel. Co. v. Pettyjohn*, 88 Va., 296, is a sufficient authority upon this point. It is true that an action of debt lies for a statutory penalty, but this is because the sum demanded is certain, and not because the cause of action arises *ex contractu*. *Chaffee v. United States*, 18 Wall., 516.

The principle laid down by Blackstone (3 Comm., 159) that every man impliedly agrees to obey the laws of the State, and consequently to pay all penalties incurred under any act of the legislature for a violation of its provisions, is altogether too broad for a case like the present; for upon the principle of an implied contract to obey the laws, and not to injure one's neighbor, *assumpsit*, if not debt, would lie for an assault and battery, or for arson, or any other like offence, which would hardly be seriously contended for.

Accordingly, in *Zeigler v. Gram*, 13 S. & R., 102, it was held that a justice of the peace whose jurisdiction, under the statutes of Pennsylvania, was confined to those causes of action arising from contract express or implied, had not jurisdiction of an action to recover a statutory penalty for not entering satisfaction of a judgment; and Gibson, J., speaking for the court,

Opinion.

said: "When a statute imposes a penalty, but prescribes no method of recovery, recourse may doubtless be had to the action of debt; and every debt is said to arise out of a contract either express or implied. But in jurisprudence the word contract is generally used to denote a bargain or agreement; and it is plain that in these acts of assembly it was used in that sense by the legislature, who had in view those contracts that arise immediately out of a course of dealing between the parties, and not that sort of contract that arises remotely out of the compact of government."

The same view was taken by the New York Court of Appeals in *McConn v. Railroad Company*, 50 N. Y., 176.

Another case in point is *West. Union Tel. Co. v. Taylor*, 84 Ga., 408; S. C., 11 S. E. Rep., 396. There, the jurisdiction of justices' courts being limited by the constitution of Georgia to "civil cases arising *ex contractu*, and cases of injuries or damages to personal property," the question was, whether they could be invested by the legislature with jurisdiction over actions to recover a penalty imposed by statute upon telegraph companies for undue delay in the transmission and delivery of messages; and it was held that they could not, on the ground that the penalty was for a violation of a public duty, and not for a breach of contract. That was an action by the person to whom the message was addressed; and in answer to the suggestions of counsel, that there was a contract between the sender of the message and the defendant company which would support the action, the court said: "The penalty is not given, in whole or in part, as compensation in damages for a violation of that contract. On the contrary, both the sender, with whom the company had a contract, and the person to whom the telegram was addressed, and with whom the company had no contract, are left in full possession of all their rights, outside of penalty, in every respect. That the penalty is imposed solely for the wrongful violation of a public duty is manifest; and it

Opinion.

seems to us to make no difference that this particular instance of that duty had its origin in contract."

It follows that the plaintiff in the present case is not entitled to recover the penalty sued for by virtue of "any contract," and, consequently, that the judgment of the circuit court must be reversed, and such order entered here as that court ought to have entered.

JUDGMENT REVERSED.

Staunton.

MYERS v. COMMONWEALTH.

SEPTEMBER 13th, 1894.

1. CRIMINAL PROCEEDINGS—*Venire facias*.—A *venire facias* is an indispensable process to authorize sheriff to summon a jury in a felony case, though the writ itself is not a part of the record unless made so by bill of exceptions or otherwise; nor does failure to object in the trial court to the want of such process waive the right of objection in this court.
2. *IDEM*—*Subsequent legislation*.—Nor is the rule altered as to this case by Acts 1893—4, p. 494, amending Code, § 3156, as the amendment was not intended to be retrospective in its action, statutes being always to be construed to operate *in futuro*, unless a retrospective effect be clearly intended.

Argued at Richmond. Decided at Staunton.

Error to judgment of county court of Caroline county, pronounced December 15, 1893, in a prosecution against James Myers, plaintiff in error here, for a felony, a writ of error having been refused by the judge of the circuit court of said county. Opinion states the case.

J. H. Dejarnette and *R. G. Moncure*, for plaintiff in error.

Attorney-General R. Taylor Scott, for the commonwealth.

LEWIS, P., delivered the opinion of the court.

VOL. xc—99

Opinion.

The prisoner was indicted and convicted in the county court of Caroline county for housebreaking with intent to commit larceny. Of the several assignments of error it will be necessary to consider one only, and that is the first, which is founded on the fact that the record does not show that there was a writ of *venire facias* in the case.

This is a fatal defect. As this court has often decided, a *venire* is an indispensable process, both at common law and under the statute, to authorize the sheriff to summon a jury in a felony case, although, as was said in *Spurgeon's Case*, 86 Va., 652, the writ itself is not a part of the record, unless made so by bill of exceptions or otherwise.

In the appendix to Chitty's Blackstone (2 vol., ed. 1865), is given the form of a record in a felony case, in which, after the indictment, the arraignment, the plea and issue, follows the order for a *venire*, or the award of jury process, as it is technically called, which begins in these words: "Therefore let a jury thereupon here immediately come," etc., after which follows the recital that "the jurors of the said jury by the said sheriff for this purpose impanelled and returned, to wit, [naming them], being called, come," etc.

This is in conformity with all the old authorities, which lay it down that the first process for convening the jury is the *venire facias*, and that there must be an award on the roll to warrant the issuing of the writ. Bac. Abr., tit. Juries (B) 2; 1 Chit. Crim. Law, 720. And while this precise formula is not followed in our practice, in making up the record, yet the record must show, as one of the essential formalities in a felony case, that the jury were brought in under a *venire*; and, independently of the recent statute, to be mentioned presently, the failure of the accused to object to the want of a *venire* before the swearing of the jury does not preclude him from objecting afterwards. He may even do so for the first time in the appellate court. This is so because, at common law, the record must affirmatively show compliance with all essential formali-

Opinion.

ties in a felony case in order to constitute a conviction by due process of law, some of which essentials were enumerated in *Spurgeon's Case*, *supra*.

In the present case all that the record shows in regard to the summoning of the jury is as follows: "This day came again the attorney for the commonwealth, and the prisoner was led to the bar in custody of the jailer of this court, and a panel of twenty jurors summoned by the sheriff of this county, sixteen of whom were examined by the court and found free from all legal exception and qualified to serve as jurors according to law. Thereupon the accused struck from the panel four of said jurors, and the remaining twelve against whom there was no legal objection, viz: W. P. Goodwin [and eleven others, naming them] were sworn," etc.

This does not show that there was any jury process in the case, nor can the defect be supplied by presumption. *Dougherty v. Commonwealth*, 69 Pa. St., 286; *Spurgeon's Case*, *supra*.

The attorney-general, however, contends that as no objection on that ground was made in the trial court, the case is within section 3156 of the Code, which provides that "no irregularity in any writ of *venire facias*, or in the drawing, summoning or impannelling of jurors shall be sufficient to set aside a verdict, unless the party making the objection was injured by the irregularity, or unless the objection was made before the swearing of the jury." But this position, apart from previous decisions on the subject, is untenable. In the first place, section 3156 is a literal copy of section 25 of the act of April 9, 1853, the 28th section of which act expressly provided that "nothing contained in the preceding sections" should "apply to the impannelling of juries in felony cases" (Acts 1852-53, p. 46); and not only the immediate context, but the title of chapter 152 of the Code, in which chapter section 3156 is embraced, shows that the provision relied on was intended to apply to "juries in civil cases" only. It is true that by the act of January 18, 1888, section 3156 was extended to "all cases, criminal as well

Opinion.

as civil," but the effect of this extension, as was held in *Jones' Case*, 87 Va., 68, was to cure any *irregularity* in the *venire facias*, leaving untouched any felony case in which there is no *venire* at all.

Since the appeal in the present case was taken, the legislature has amended and re-enacted section 3156, and added thereto the following provision: "And no judgment shall be reversed for the failure of the record to show that there was a *venire facias*, unless made a ground of exception in the trial court before the jury is sworn"; which provision is made applicable to all cases, criminal as well as civil. Acts 1893-94, p. 494.

This act was not referred to in the argument at the bar, nor does it affect the present case. A sufficient ground for so holding is the general rule that statutes are to be construed to operate *in futuro*, unless a retrospective effect be clearly intended. Bac. Abr., tit. Statute. Or, to use the language of the court in *City of Richmond v. Supervisors of Henrico County*, 83 Va., 204, "a statute is never construed to be retroactive, except the intent that it shall so operate plainly appears upon its face"; and here not only does no such intent appear, but when it is said, as the act in question does say, that no judgment shall be reversed for failure of the record to show that there was a *venire* in the case, unless objection is made before the swearing of the jury, it is evident that the act was intended to act prospectively only.

If it could be fairly construed as intended to apply to a felony case pending in the appellate court at the time of its enactment, the question would arise whether, as to such a case, it would not be void as the attempted exercise of judicial functions, and, also, as an *ex post facto* law, on the ground of its altering the situation of the accused to his disadvantage. Cooley, Const. Lim. (3d ed.), 87, 94; *Ratcliffe v. Anderson*, 31 Gratt., 105; *Kring v. Missouri*, 107 U. S., 221; *Medley, Petitioner*, 134 *Id.*, 160; *Duncan v. Missouri*, 152 *Id.*, 377; 7 Ency. of Law, p. 531, and cases cited.

Opinion.

In *State v. Fleming*, 66 Me., 142, an act designed to validate pending indictments found by a grand jury not legally drawn, was held void, on the principle laid down in the previous case of *State v. Doherty*, 60 Me., 504, where, in respect to a similar statute, the court said: "It assumes retroactively to invest with the authority, force and effect of law proceedings, trials, judgments, sentences and punishments in criminal cases, which up to the time of its enactment were illegal and void, and which, but for it, would have remained so to this day. It is clearly within the class of subjects inhibited by the national and state constitutions, as topics of legislation, and is included in the provision against passing any law to deprive any person of life, liberty, or property 'without due process of law,' or 'but by the law of the land.'"

Other authorities might be cited to the same effect, but it is needless to do so, as the act in question, as we have said, was not intended to operate retrospectively.

We must, therefore, hold according to the rule of the common law, as it existed prior to the enactment of the statute, that the failure of the prisoner to raise the objection now insisted upon before the swearing of the jury, was not a waiver of the right to object, and, consequently, that the judgment must be reversed, and the case remanded for a new trial. *Hall's Case*, 80 Va., 555; *Jones' Case*, 87 *Id.*, 63.

JUDGMENT REVERSED.

Richmond.**COMMONWEALTH v. CHARLOTTESVILLE PERPETUAL BUILDING &
LOAN COMPANY.**

NOVEMBER 8th, 1894.

Absent, Richardson and Hinton, JJ.

1. **TAXATION—Capital stock—Shares—Double taxation**—The capital stock and the shares of the capital stock are distinct things, the former belonging to the corporation and the latter to individuals. Both may be taxed, and it is not double taxation. *State Bank of Va. v. City of Richmond*, 79 Va., 113.
2. **IDEM—Construction of statutes—Non-residents.**—Acts 1889-'90, p. 201, § 8, sub-section 2, taxing "capital, including moneys, &c.," and sub-section 3 thereof, taxing "the value of all capital of incorporated joint stock companies not otherwise taxed: *held*, to authorize the taxation of the capital stock of such companies, not otherwise taxed, as well as the shares in the hands of the stockholders of the companies; as the word "capital" in the former sub-section signifies money or other thing invested, including such shares, whilst in the latter it signifies the capital stock paid in to conduct the business; and that the words "capital not otherwise taxed," in the latter, is not confined to the holdings of non-resident or otherwise inaccessible stockholders.

Argued at Staunton. Decided at Richmond.

Error to judgment of corporation court of the city of Charlottesville, rendered September 30, 1893, on a motion of the Charlottesville Perpetual Building and Loan Company for the correction of certain alleged erroneous assessments of taxes, and for the refunding of certain taxes alleged to have been

Statement—Opinion.

illegally exacted of the plaintiff on its capital stock. The judgment being in favor of the plaintiff, the commonwealth obtained a writ of error from one of the judges of this court. Opinion states the case.

Attorney-General R. Taylor Scott, for commonwealth.

George Perkins, for defendant in error.

LEWIS, P., delivered the opinion of the court.

The question to be determined is, whether the capital stock of the appellee, the Charlottesville Perpetual Building and Loan Company, an incorporated joint stock company, is taxed by the third sub-division of the eighth section of the revenue law of 1890, or whether, if it is taxed at all, the tax thereon is included in the tax imposed on the shares in the hands of the stockholders by the second sub-division of the same section. These sub-sections, upon the construction of which the case turns, are as follows, to wit:

“Second. He [the commissioner] shall ascertain from each person in his district, city, or town the value of capital, including moneys, credits, or other thing remaining invested, whether said investment was made originally in this or any other State or country, and the value of all capital loaned, used, or employed in business out of this State by himself, his agent, or other person for him.

“Third. He shall ascertain the value of all capital of incorporated joint stock companies not otherwise taxed; but real estate belonging to such company shall not be held to be capital, but shall be listed and taxed as property, and not as capital.” Acts 1889–90, p. 201.

The court below held that sub-section No. 2 taxes the shares of a joint stock company in the hands of the stockholders, because they are investments within the meaning of the statute;

Opinion.

and, further, that as the aggregate of the shares represents the corporate assets of every description, the capital of the company is not to be listed under the third sub-section, because it is otherwise taxed, viz.: by the preceding sub-section.

We are unable to concur in this view. We agree that while shares are not taxed *eo nomine*, they are embraced in the second sub-section, for the reason given by the corporation court. But a tax on the shares is not a tax on the capital. The two are very different things. The capital or capital stock belongs to the corporation; the shares to individuals; and being different property interests, and consequently distinct subjects of taxation, the better opinion is that taxing both is not double taxation. *Burroughs, Taxation*, p. 170; *State Bank v. City of Richmond*, 79 Va., 113; *Farrington v. Tennessee*, 95 U. S., 679.

That a tax on the shares is not a tax on the capital stock is well illustrated by a number of cases in the Supreme Court of the United States, holding that while the shares of national banks are taxable by the states, their capital invested in United States securities is not. *Van Allen v. The Assessors*, 3 Wall., 573; *National Bank v. Commonwealth*, 9 Id., 353; *Tennessee v. Whitworth*, 117 U. S., 129, and cases cited.

Now, it is not only to be presumed that the difference between the capital and shares, as recognized in these decisions and in all the authorities on the subject, was known to the legislature, but the fact appears affirmatively from the 17th section of the statute, which exempts from taxation the capital of banking associations, and taxes the shares of stock to the stockholders. Stress, however, was laid in the argument at the bar on the fact that the term "capital" is used as well in the second as in the third sub-section, above quoted. But it is a mistake to suppose that it is used synonymously in both. In the second it signifies money or other thing invested, and therefore includes, as we have said, shares of stock in the hands of the stockholder; whereas in the third it signifies the capital stock of

Opinion.

the company; that is, the aggregate of the mutual subscriptions of the stockholders, paid in as the basis of the business of the concern, and which belongs to the company. This is apparent from the language of the statute.

Moreover, had the legislature intended to tax the capital of joint stock companies to the stockholders, its intention, surely, would have been unmistakably expressed; and if such was the intention in enacting the second sub-section, why, so far as the question involved in the present case is concerned, was the third enacted at all?

The appellee's answer to this is rather fanciful than sound. The argument is that as the latter sub-section speaks of capital "not otherwise taxed," its purpose is to tax the capital merely to the extent that the holdings of non-resident or otherwise inaccessible stockholders cannot be reached. But there is no just ground for this contention. The statute, if it were susceptible of such a construction, would indeed be an anomaly. It would, moreover, be unconstitutional, since to collect of A and B the tax on the shares held by them, respectively, and to make up for what cannot be collected of C, a non-resident stockholder, by a tax on the capital of the company, would be in violation of the constitutional requirement that taxation shall be equal and uniform.

It is contended, also, that in no other way can effect be given to the words "not otherwise taxed" than by holding that the capital stock of joint stock companies was intended to be embraced in the second sub-section, as there is no other law taxing it. It may be, however, that there are some companies in the State whose capital stock, by their charters or other special provision, is taxed differently, though we are not advised that there are any such. The provision, moreover, of the third sub-section is a general one, which would adapt itself to any future legislation on the subject. But be that as it may, the point is not a controlling one in the case, because only by ignoring the distinction between capital stock and capital in-

Opinion.

vested in shares of stock, which was evidently in the mind of the legislature when the statute was passed, can the case be brought within the second sub-section, or taken out of the operation of the third.

The judgment of the corporation court, must, therefore, be reversed, and such order entered here as that court ought to have entered.

JUDGMENT REVERSED.

Richmond.

WEISIGER v. RICHMOND ICE MACHINE CO.

NOVEMBER 8th, 1894.

Absent, Fauntleroy, J.

1. **ANSWER—Withdrawal—Demurrer.**—Where there has been no unreasonable delay in making the motion, the court may, at its discretion, allow answer to be withdrawn and demurrer filed to the bill.
2. **STOCK SUBSCRIPTIONS—Cancellation—Doctrine.**—Contract to purchase stock, induced by fraudulent representations, is not void, but only voidable at purchaser's option. Where rights of creditors are concerned, he must use reasonable care and vigilance in discovering fraud, and upon its discovery must promptly repudiate the purchase. If after discovering it, he does any act inconsistent with such disaffirmance, he will be held to have waived the fraud.
3. **BILL TO CANCEL—Case at bar.**—In the case here, the bill, as set forth in the opinion: *held*, bad on demurrer.

Appeal from decree of chancery court of the city of Richmond, rendered July 26, 1892, in a suit in equity wherein E. W. Weisiger and others were plaintiffs and the Richmond Ice Machine Company and others were defendants. Opinion states the case.

William J. Clopton and J. H. Webb Peploe, for appellants.

William P. DeSaussure and Robert Stiles, for appellees.

LEWIS, P., delivered the opinion of the court.

Opinion.

The bill was filed by the appellants for a rescission of their subscriptions to the stock of the defendant company, and to recover back the money paid on account thereof on the ground that they had been severally induced to subscribe by fraudulent representations. The chief ground of the charge of fraud was a written statement put forth and signed by the secretary and treasurer of the company, purporting to have been taken from the books of the company, which represented the company to be in a prosperous condition, with a net surplus (*i. e.*, an excess of resources over liabilities) of \$27,933 67.

The subscriptions were made in September, 1890, and the suit was commenced about a year thereafter.

The bill states that "some months" after they had subscribed, the complainants for the first time learned that they had been deceived by reason of the omission from the said written statement of the fact (which was studiously concealed from them) that there was a liability on the company to one Johnson for paid-up stock to the amount of \$27,000, and, that upon their asking an explanation, the officers of the company "again succeeded in pulling the wool over complainants' eyes" by the representation that the company had earned, and would forthwith declare a dividend of forty per cent. "The matter was then allowed to proceed," the bill further states, "without, however, any dividend having been declared," although the complainants, some time afterwards, demanded a dividend. The bill then goes on to aver that various subsequent statements were made, each in its turn, showing the company to be in a less flourishing condition than its predecessors, and all containing misleading and fraudulent representations; and, further, that the company is, in fact, in a state of hopeless insolvency.

The company and several of its officers were made defendants, all of whom answered. Afterwards, and before any further proceedings were had in the cause, the defendants asked and obtained leave, over the objection of the plaintiffs,

Opinion.

to withdraw their respective answers and to demur, which was done, whereupon the demurrers were sustained and the bill dismissed by the decree complained of.

The objections that have been urged to this decree are (1) that the court erred in allowing the defendants to demur after they had answered, and (2) that, independent of this consideration, the demurrers ought to have been overruled.

As to the first point, it is enough to say that it was within the discretion of the court to allow the defendants to withdraw their answers and to demur, and as there was no unreasonable delay in moving for leave to do so, we are of opinion that the objection is not well founded.

Then the question is, Does the case stated in the bill entitle the complainants to the relief sought? We think not; and this is so apart from any merely technical objection to the bill for vagueness or otherwise.

A contract to purchase stock induced by fraudulent representations is not void, but only voidable at the option of the purchaser. If, as was said in *Bosher v. Richmond and Harrisonburg Land Co.*, 89 Va., 455, the representations are made by promoters, or by a prospectus, the innocent subscriber may rely upon them without investigation. Ordinarily, however, where the rights of creditors are concerned, he must exercise reasonable care and vigilance in discovering the fraud, and in any case he must, upon discovery of the fraud, promptly repudiate the purchase. He has no right to hold on to the stock, in the hope or expectation of realizing a profit therefrom, and failing in this, to disaffirm the contract. Hence, if after discovering the fraud, he demands or receives a dividend, or continues to act as a stockholder, or does any act inconsistent with an intention to disaffirm the contract, he will be held to have waived the fraud.

As was said by the Master of the Rolls in *Ashley's case*, L. R., 9, Eq., 263, "The leading principle in all these cases is this: "A man must not play fast and loose; he must not say,

Opinion.

'I will abide by the company, if successful, and I will leave the company if it fails'; and, therefore, whenever a misrepresentation is made of which any one of the shareholders has notice, and can take advantage to avoid his contract with the company, it is his duty to determine at once whether he will depart from the company or whether he will remain a member." The same principle has been recognized in numerous cases, English and American. Indeed, it is fundamental, and rests upon a two-fold reason, viz.: (1) Because the subscriber's remaining in the company may induce others, upon the credit of his name, to become members; and (2) because it may likewise induce others to give credit to the company for the same reason. *Ogilvie v. Knox Ins. Co.*, 22 How., 380; *Upton v. Trillierock*, 91 U. S., 45; *Upton v. Englehart*, 3 Dill., 496; 1 Cook on Stock, Stockholders and Corp. Law (3d ed.), secs. 151, 160, 165, and cases cited.

Tried by this test, the decree in the present case must be affirmed. The bill admits that after the complainants discovered the fraud by which they were induced to subscribe for the shares in question, they "allowed the matter to proceed," (or, in other words, they waived the fraud, and elected to remain in the company), upon being told, when an explanation was demanded, that a large dividend would soon be declared; and although they afterwards unsuccessfully demanded a dividend, and although the condition of the company was shown in a less favorable light by each successive statement that was subsequently made, one of which, at least, was furnished not later than March 9, 1891, yet it was not until some time in the ensuing September, and after the company had become "hopelessly insolvent," that the bill was filed. In the mean time rights of creditors had intervened, and the application to rescind the contract in question was consequently too late. *Barnett v. Barnett*, 83 Va., 504, 510; 2 Pom. Eq., sec. 897.

DECREE AFFIRMED.

Richmond.

VOIGHT v. RABY AND ALS.

DECEMBER 20th, 1894.

1. **EJECTMENT—Evidence—Exceptions.**—In such action plaintiff must establish in himself a legal title to the possession of the premises, and defendant may confine his evidence to disproving plaintiff's pretensions, except that where defendant entered under plaintiff as tenant, &c., he cannot set up title in a third person.
2. **IDEM—Case at bar.**—The evidence here : *held*, as showing not only no title in plaintiff to the premises in controversy, but also that a survey of the boundaries of said premises made many years previous by the county surveyor, as the property of a third party, plaintiff was present and acquiesced.

Error to judgment of circuit court of Nansemond county, rendered April 11, 1890, in an action of ejectment, wherein Thomas M. Raby was plaintiff and John T. Voight and Nancy J. Voight, his wife, and Peter B. Prentis, trustee, were defendants. The object of the suit was to recover possession of a certain tract of land, described as the "Statia Hardy" and the "Hezekiah Raby" tracts, which the defendants claimed to hold by adversary possession for over fifteen years under a deed from Johu R. Kilhy, sale commissioner, under a decree of the said court. The judgment being adverse to the defendants, they brought the case here by writ of error and *supersedeas*. Opinion states the case.

White & Garnett, for plaintiff in error.

John H. Wright and *E. E. Holland*, for defendant in error.

Opinion.

RICHARDSON, J., delivered the opinion of the court.

Such proceedings were had in the said action that the trial came on and was finally had at the October term, 1889, when the jury found a verdict, as follows: "We, the jury, find for the plaintiff a fee-simple title to two hundred and thirty-five acres of the land described in the declaration, and bounded by the Green tract, the land of R. Umphlet, the Robert Johnson land, the Amos Riddick land, the Wilson Ellis tract, the Abram Griffin land, the Henry Raby land, and the land of Thomas M. Raby, as shown on the plats used in evidence in the cause; and that the defendants unlawfully withhold from him the possession thereof." Whereupon the defendants moved the court to set aside the verdict and grant them a new trial, upon the ground that the said verdict was contrary to the law and the evidence; which motion being argued, the court took time to consider of its judgment, and the case was continued until the next term. And at the April term, 1890, the court overruled the motion made at the preceding term to set aside the verdict and grant a new trial, to which ruling of the court the defendants excepted. And thereupon the court proceeded to give judgment according to the finding of the jury, and to said judgment of the court the defendants obtained a writ of error.

At the trial of the cause the court instructed the jury as follows: "The court instructs the jury that if they believe that the defendants have succeeded in proving adversary possession, and in furnishing *prima facie* evidence of its continuance for fifteen years or more, it is then incumbent on the plaintiff to show that the continuity has been interrupted or broken."

The plaintiff claims under the will of his father, James Raby, which is as follows:

"In the — of God, amen: "I, James Raby, of the Upper parish of Nansemond county, in the State of Virginia, being sick and in low state of health, do make and ordain this, my last will and testament, in manner and form following, to wit:

Opinion.

First. I give my soul to God that gave, and my body to the earth, to be buried in a christian-like manner, at the discretion of my executors hereafter named, and as to such property as God has blessed my labors with, I give and dispose of the same in the following manner, to wit:

Item. I give and bequeath to my son, Henry Jimmerson Raby, the plantation where I now live; also *my* $\frac{1}{2}$ mill seat and mill; the said land contains fifty acres mor or less; joining Wilson Ellis and Amos Barnes and Kedar Raby; my old gun, my blacksmith's tools *allso*, fifty dollars in cash to be raised out of my estate, for the purpos of schooling him, to him and his heirs forever.

Item. I give and bequeath to my sone, Thomas M. Raby, all the remaining part of my land, including the whole in my possession, one old gun and one small one; *allso*, one hundred dollars to be raised out of my estate, for the purpos of schooling him, to him and his heirs.

Item. I give and bequeath to my *nefew*, Quintin Raby, son of Hezekiah Raby, the land where his father formerly lived, containing fifty acres mor or less, with this condition: if the said Quintin Raby should happen to die without a lawful heir, the land to returne to my son Thomas M. Raby.

Item. I lend to my beloved wife, Parmela Raby, the use of my plantation and land, where I now live, during her natural life or widowhood; *all* so, all the remaining part of my estate, including all my stock of all kinds, and all my household and kitchen furniture, for the purpose of raising my childring and paying the above named legaces to Henry J. Raby and Thomas M. Raby and my just debts; my will and desire is that after the death or marriage of my wife, Parmela Raby, all the property that may be found of any kind, be equally divided between my three youngest children, to-wit: Thomas M. Raby, Temple and Mediann Raby, *shere and share* alike.

Item. My will and desire is that if either of my sons should

Opinion.

happen to die without a lawful — the land given them should descend to the other.

Lastly. I nominate and appoint my friend, Jethro Riddick, my *soul* executor to execute this my last will, revoking all other *will*; *retifying* and confirming this to be my last will.

In witness, I have set my hand and seal this 16th day of March, 1829.

JAMES RABY. [SEAL.]

Signed and acknowledged in the presents of—

JOHN HARRELL,

JOHN KNIGHT,

his

EDWARD ✕ SAUNDERS.”
mark.

Other than the will aforesaid the plaintiff offered no documentary evidence.

The defendants traced their title back to Rispah Raby, the widow of Hezekiah Raby, deceased, and by a succession of conveyances down to John T. Voight covering a period of some — years. By reason of the destruction of many of the public records of Nansemond county, the chain of title under which the defendant, John T. Voight, claims, is somewhat irregular; but in the main the defects therein are substantially cured by the official certificates as to the existence and destruction by fire of some of the deeds constituting links in said chain of title, but this is immaterial, under the peculiar circumstances of this case, as will be seen in the progress of this opinion. It will be seen also, that the plaintiff at the trial, somewhat departed from the purpose indicated in the declaration. He was introduced as a witness on his own behalf and testified that he had always claimed the land in controversy, and had not brought suit therefor because of his poverty or inability to bear the expense of litigation. But this pretension is cut up by the roots by the statute, sec. 2916, Code 1887, which declares: “No continual or other claim upon or near any

Opinion.

land shall preserve any right of making an entry or of bringing an action." In the action of ejectment it is incumbent upon the plaintiff, and he must make out a legal and possessory title to the premises in controversy, and the defendants' evidence may be confined to disproving the plaintiff's pretension or rebutting the presumptions which may arise from his proofs. The defendant need not offer any evidence of title in himself or of a third person. It is sufficient if he make it appear that the legal and possessory title is not in the plaintiff: for it is the rule that the plaintiff must recover, if at all, upon the strength of his own title, and cannot do so by reason of the weakness of the defendant's title; the rule being that possession gives the defendant a right against every person who cannot show a good title. *Hutchinson's Land Titles*; citing *Haldane v. Harvey*, 4 Burr, 2484; *Wilson v. Inloes*, 11 Gil. & J., 551; *Witten v. St. Clair*, 27 W. Va., 770.

This general rule is, however, subject to important qualifications; as to where the defendant has entered under the title of the plaintiff, and in subordination thereto, as tenant, trustee, co-parcener, or licensee, he cannot set up title in a third person, in opposition to that of the plaintiff under which he entered. The plaintiff in the case here not only fails to show that he was entitled to the possession at the time of the institution of this suit, but in effect establishes the fact that he never was at any time in possession, or entitled to possession of any portion of the land in controversy. One of the intermediate alienees of the land in controversy, one Johnson by name, many years ago, and while he was the owner of this land, became embarrassed, and in a suit in equity by his creditors to subject the same to the payment of his debts, J. R. Kilby was appointed commissioner to make sale of the same. A survey was had by the county surveyor of Nansemond county, in order to ascertain the true boundaries and quantity of land contained in the premises in controversy. In making the survey it became necessary to establish the dividing line or boun-

Opinion.

dary between the land in question and that devised by the will of James Raby to the plaintiff below, Thomas M. Raby. The dividing line was run, and found to be a well marked and defined line. At the running of this line, which was many years ago, the plaintiff below, Thomas M. Raby, who is the defendant in error here, was present, acquiesced in the running of said line, making no objection thereto. This effectually overthrows the claim attempted to be set up at the trial, that the land in controversy is part of the James Raby tract devised by his will aforesaid.

It is true that at the trial the plaintiff introduced several witnesses, some of them very aged persons, who testified in substance that they had known the land in controversy for many years, and had always understood it to be the James Raby land; but neither of these witnesses professed to know the lines and boundary of the land in controversy, or had been so related to it as to have any peculiar knowledge in respect thereto. Their testimony, therefore, is worth but little, if anything. Much more might be said in respect to the utter want of merit in the claim asserted by the defendant in error, Thomas M. Raby. Perhaps no case was ever presented more utterly barren of merit as the claim thus asserted. Suffice it to say that in no possible view can the judgment of the court below be sustained. We are, therefore, of opinion to reverse said judgment, set aside the verdict of the jury, and remand the cause to the said circuit court of Nansemond county for a new trial to be had therein in accordance with the views expressed in this opinion.

JUDGMENT REVERSED.

Richmond.**WITZ, BEIDLER & Co. v. MULLIN'S PERSONAL REPRESENTATIVE.**

DECEMBER 20th, 1894.

1. **EQUITABLE RELIEF—Breach of contract.**—A claim for damages for a breach of contract to do some collateral thing, is not a fit subject for the jurisdiction of a court of equity.
2. **IDEM—Trust deed—Remedy.**—Where suit is brought to enforce a deed of trust whereby are secured "all the debts and liabilities of certain firms and of the individuals composing them": *held*, no claim merely sounding in damages for breach of contract to deliver shares of stock, ought to be taken cognizance of by a court of equity, but the claimants should be left to their remedy at law.
3. **CASES COMPARED.**—*Nagle v. Newton*, 22 Gratt., 814, and *Campbell v. Rust*, 80 Va., 653, compared with and distinguished from the case at bar.

Appeal from decree of circuit court of Shenandoah county, rendered April 6, 1892, in a chancery cause styled H. K. Antrim and wife against D. F. Kagey and others. The decree being adverse to the defendants, Witz, Beidler & Co. and others, they appealed. Opinion states the case.

R. T. Barton and Walton & Walton, for appellants.

M. McCormick and S. S. Turner, for appellees.

LEWIS, P., delivered the opinion of the court.

The only question we deem it necessary to consider is, whether the circuit court, sitting as a court of equity, had ju-

Opinion.

risdiction to pass upon so much of "the Mullin claim" as is involved in this appeal. That claim consisted of three items, viz.: (1) Board bill, \$125; (2) promissory note, \$5,566 69; and (3) "the value of two hundred and fifty shares of the Valley Land and Improvement Company, \$25,000." The controversy in this court extends only to the latter item.

It is conceded that the claim as respects this item sounds in damages. It grows out of an alleged breach of contract on the part of Kagey and Marshall to deliver to Mullin 250 shares of stock in the said company, which contract was evidenced by writing.

It is certainly a proposition not to be disputed, that a claim to damages for a breach of contract, merely sounding in damages, is not a fit subject for the jurisdiction of a court of equity. It is contended, however, by the appellee that it was competent for the circuit court to take cognizance of the claim to grant relief by way of damages, because such relief is merely incidental to the main object of the bill; and *Nagle v. Newton*, 22 Gratt., 814, and *Campbell v. Rust*, 85 Va., 653, are relied upon in this connection. In those cases it was held to be the settled doctrine that when a court of equity has jurisdiction of the case, and it is a case proper for specific performance, such court may, as ancillary to specific performance, decree compensation or damages. But the present is not a case of that sort. The object of the suit was the administration of a trust fund; in other words, to enforce a deed of trust, in respect to which only those persons secured in the deed were interested.

That deed was executed in December, 1890, by D. F. Kagey & Co. and by S. W. Miller & Co., and secures all "the debts and liabilities" of those firms and of the individuals composing them, many of which debts are specifically mentioned in the deed. No mention is made of any claim merely sounding in damages; and we find nothing in the deed, a copy of which is exhibited with the bill, to warrant the conclusion that any such claim was intended to be secured. The term "liabili-

Opinion.

ties" was evidently used synonymously with "debts;" for after specifically mentioning many debts, it was added: "and all other debts or liabilities of D. F. Kagey and J. W. Miller, individually and as partners, &c., without any preference or priority to any of the debts hereinbefore set forth or referred to," &c.; and then after providing that the trustees in the deed should settle their accounts every six months before a commissioner or commissioners of accounts, there follows a provision requiring notice of the time and place of such settlements to be given to all "creditors above referred to"; thus showing that only "creditors" were intended to be secured, and not those having a right to sue to recover damages for an alleged breach of a contract to do some collateral thing, as to deliver shares of stock. Webster defines "creditor" as "one who credits, believes, or trusts; one who gives credit in business matters; and hence, one to whom money is due."

We are constrained, therefore, to hold that the third item in the claim before mentioned, was not secured by the deed of trust, and hence that the circuit court, sitting as a court of equity, ought not to have taken cognizance of it; but ought to have left the parties to their remedy at law. Until a judgment is obtained, the relation of debtor and creditor cannot be said to exist; and when a judgment shall have been obtained, it can then be set up in the present suit. *Paxton v. Rich*, 85 Va., 378, 382.

It need only be added that the fact that objection to the jurisdiction was not made in the court below does not affect the appellants' right to raise the objection in this court, the matter in controversy not being proper for any court of equity; and in such a case objection to the jurisdiction may be made at the hearing, or even for the first time in the appellate court. *Green & Suttle v. Massie*, 21 Gratt., 356; *Buffalo v. Town of Pocahontas*, 85 Va., 222, 225.

It follows that the court below erred in refusing leave to the appellants to file a bill of review (although the jurisdictional

Opinion.

question was not specifically raised in the bill of review), and that the decree must be reversed, and the cause remanded for further proceedings in conformity with this opinion.

DECREE REVERSED.

Richmond.

ALEXANDER v. COMMONWEALTH.

DECEMBER 20th, 1894.

Absent, Lacy and Fauntleroy, JJ.

1. **CRIMINAL PROCEEDINGS—Joinder of offences.**—Where several articles are stolen at one time and place, the stealing is regarded as one transaction and may be charged in a single count, though the articles belong to different persons.
2. **IDEM—Not a felony.**—Where at the trial of an indictment for larceny the evidence shows that the aggregate value of the property stolen was less than fifty dollars, a conviction for a felony is erroneous.

Error to judgment of county court of Clarke county to which the judge of the circuit court of said county denied a writ of error, at the trial of an indictment against one Alexander for larceny. The jury found a verdict of guilty and fixed the term of his imprisonment in the penitentiary at five years. Opinion states the case.

Blackburn & Smith, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LEWIS, P., delivered the opinion of the court.

Alexander, the plaintiff in error, was indicted in the county court of Clarke county for larceny. The indictment contains

Opinion.

a single count, and charges that the accused "on the 28th day of October, 1893, in the said county, two hogs of the value of \$15 62 each, and two hogs of the value of \$10 each, the goods and chattels of J. Frank Galloway, and two hogs of the value of \$15 each, the goods and chattels of Aaron Price, then and there being, feloniously did steal, take and carry away," etc. A motion by the prisoner to quash the indictment was overruled, and having been put upon his trial, he was found guilty, and sentenced, in accordance with the verdict, to five years' confinement in the penitentiary.

There are two assignments of error, viz.: (1) That the trial court erred in overruling the motion to quash the indictment; and (2) in afterwards overruling the motion for a new trial.

It is contended, in support of the first assignment, that the indictment is bad for duplicity, in that it charges in one count not only two offences, but offences of different grades, viz., a felony and a misdemeanor. But this is a mistaken view. The authorities are abundant in support of the contention of the attorney-general that where several articles of property are stolen at the same time and place, though the stolen goods belong to different persons, the stealing is regarded as one transaction, and, therefore, as one offence, which may be charged in a single count. Hence, whether in a case like the present, the indictment is double, depends upon whether it charges more than one larceny, or taking, and not on the number of articles taken, nor their ownership.

Lord Hale lays it down that if a thief at the same time steals goods of A to the value of six-pence, goods of B to the value of six-pence, and goods of C to the value of six-pence, being perchance in one bundle, or upon a table, or in one shop, this is grand larceny, at common law, because it is one entire felony done at the same time, though the persons had several properties, and therefore if in one indictment they make grand larceny. 1 Hale, P. C., 531.

In the 12th volume of the Am. & Eng. Encyclopædia of

Opinion.

Law (p. 825), where the subject is discussed and many of the cases are collected, it is said that while an indictment is bad for duplicity if it charges two or more offences in a single count, it is not duplicity to charge in one count the larceny of the goods of several different owners taken at the same time, though the value and owner of each article must be specifically set forth.

So, in conformity with this rule, it was said in *Sprouse's Case*, 81 Va., 374, that a man may be indicted in one count for the battery of two or more persons at the same time, or for a libel upon two or more persons when the publication is one single act. And in *Early's Case*, 86 Va., 921, it was recognized as an established rule of pleading, as well in criminal as civil cases, that no matters, however multifarious, will operate to make a pleading double, that together constitute but one connected charge, or one transaction.

Now, in the present case the indictment charges a larceny of six hogs; four the property of one Galloway, the other two the property of one Price; and upon the face of the indictment it was all one united and continuous act, or one transaction, and, therefore, one offence, although the hogs alleged to have been stolen belonged to different persons; and the names of the owners and the value of the hogs, respectively, are specifically set forth. We are constrained, therefore, to hold that the indictment is good, and that the motion to quash on the ground of duplicity was rightly overruled.

But on the second point made in the petition for the writ of error, it is equally clear that the case is with the accused; that is to say that the motion for a new trial, on the ground that the verdict was not warranted by the evidence, ought to have been granted. The evidence, viewed in the most favorable light possible for the prosecution, cannot be fairly said to show the larceny of more than two of the six hogs mentioned in the indictment, and as the aggregate value of those two is less

Opinion.

than fifty dollars, the conviction of the accused of a felony cannot be sustained.

The judgment must, therefore, be reversed, and the case remanded for a new trial.

JUDGMENT REVERSED.

Richmond.

RONALD AND WIFE v. BANK OF PRINCETON.

DECEMBER 20th, 1894.

1. **NEGOTIABLE NOTES**—*Failure of purpose—Case at bar.*—The bill avers that the note was delivered for one purpose and without the parties' consent, was used for a different purpose, and that *Solenberger v. Gilbert*, 86 Va., 778, rules the case: **HELD**: The averment of fact is not sustained by the proof.
2. **CHANCERY PRACTICE**—*Irregularities—Waiver.*—A consent submission of a cause for hearing is a waiver of irregularities at rules.
3. **APPELLATE COURT**—*Too late.*—Where for the first time the point is raised in this court that a promise in the note to pay, in case of a suit, five per cent collection fees and fifty dollars attorney's fee, is an unenforceable penalty within the ruling of *Rixey v. Pearre*, 89 Va., 113: **HELD**: Too late now to raise the point.
4. **DESTRUCTION OF NEGOTIABILITY**—*Case at bar.*—Conceding that such a promise might destroy the negotiability of the note, yet the averment that the note was delivered for the sole purpose of being discounted, not having been proved: *held*, such concession would avail the appellants nothing.

Appeal from decree of the judge of circuit court of Montgomery county, rendered in vacation June 29, 1891, in a chancery cause wherein Mrs. Sallie A. Ronald and her husband, Charles A. Ronald, were complainants and the Bank of Princeton and another were defendants. The decree being adverse to the complainants they appealed. Opinion states the case.

G. W. & L. C. Hansbrough, for appellants.

Phlegar & Johnson, for appellees.

LEWIS, P., delivered the opinion of the court.

This was a suit for an injunction to prohibit the sale of certain real estate under a deed of trust, which was given to secure to the Bank of Princeton a note for \$950, made by Charles A. Ronald payable to the order of Sallie A. Ronald, and endorsed by her.

The bill states that Charles A. Ronald was indebted to one Spindle, and that the note was placed in his hands for the sole purpose of being discounted by the bank, and the proceeds applied to the satisfaction of the Spindle debt, and that the sum of \$147 was thereupon paid by Spindle to the complainants (Ronald and wife)—the debt being that much less than the amount of the note. The bill then states that the complainants supposed the note had been discounted, but that Spindle, instead of having it discounted, had, without the knowledge or consent of the complainants, deposited it with the bank as collateral, and that the trustee in the deed of trust had advertised the trust property (which is the separate estate of the female complainant) for sale.

An injunction, according to the prayer of the bill, was awarded, which was afterwards dissolved by the decree complained of.

The appellants contend that the case is ruled by *Solenberger v. Gilbert*, 86 Va., 778, where it was held that a note delivered for one purpose could not be validly used, without the consent of the parties, for another and different purpose; and such a case is alleged in the bill in the present case; but the case as thus stated is not established by proof. The record shows that the note was used by Spindle as collateral, but the averment that it was originally delivered for the sole purpose of being discounted is not proved. The note itself does not show it, and the deed of trust, though given "to secure the bank," does not show it, for *non constat* it was not given to strengthen the collateral.

Opinion.

It is assigned as error that the circuit court erred in overruling the plaintiff's exceptions to the answer of the bank, on the ground, among others, that no notice is taken in the answer of the allegation in the bill "that the trust deed was executed to secure the note only in the event that it should be discounted by the bank." But the answer distinctly avers that "respondent knows nothing of the matters alleged in the bill as occurring or existing between the complainants and Spindle, and does not admit any of the equities alleged in the bill," which is a sufficient answer to the appellants' objection on this point.

They also insist that the proceedings at rules were irregular; but the record states that "the cause was regularly matured at rules and set for hearing," and, further, that it was submitted for hearing by consent, which cured all previous irregularities, if any there were.

The note contains a collateral promise to pay in addition to the amount of the note, in the event of a suit thereon, five per cent collection fees and fifty dollars attorney's fee in addition to the attorney's fee taxed or allowed by law; and it is contended that this provision brings the case within the ruling in *Rixey v. Pearre*, 89 Va., 113, where a similar stipulation in a note was held to be a penalty, and as such not enforceable. But no such point was made in the court below, and it is now too late to raise it.

It is also contended that such a provision destroys the negotiability of the note; but if this were conceded, the concession would not help the appellants' case, since, as already stated, the allegation in the bill that the note was made and delivered for the sole purpose of being discounted is not established by proof; and the *onus* was on the appellants to prove it.

The result of these views is that the decree must be affirmed.

DECREE AFFIRMED.

Richmond.

SWANN, EX'OR V. HOUSMAN & ALS.

● DECEMBER 20th, 1894.

Absent, Lacy, J.

1. *WILLS—Revocation—Case at bar.*—An executor filed his bill to have his testator's will construed, and submitted a writing executed by the latter, to wit: "\$1,000. This article is to signify that if Elliott Smith survive me, I bequeath him one thousand dollars of my property, free from any lien or incumbrance. To the above bequest I herewith set my hand and seal this first day of June, 1888. (Signed) Henry E. Smith. [Seal.]" Afterwards the testator made a will, dated December 2, 1889, disposing of his entire estate, and containing no reference to said writing or to Elliott Smith, which was duly probated: **HELD:** Said writing was not a contract, but was a will, and was revoked by the subsequent testament.
2. *IDEM—Contract—Evidence.*—One may contract to make a provision for another by will; but the evidence must be clear and convincing.
3. *WITNESSES—Competency.*—The widow of the testator held incompetent to prove such contract and to establish the debt against the estate of her late husband.
4. *PERSONAL REPRESENTATIVES—Appeal—Individual grievance.*—It is well settled that where an executor, *as such*, appeals from a decree which does not aggrieve the estate, the question cannot be considered whether he is aggrieved as an individual.
5. *DECEDENT'S DEBTS—Personalty—Realty.*—The personal estate being the primary fund for paying decedent's debts, it will not be exonerated by a charge on the realty, without plain intent to that effect.

Appeal from decree of circuit court of Botetourt county, rendered October 30, 1891, in a chancery cause wherein George Swann, as executor of Henry E. Smith, was complainant, and Louis Housman, Jr., and others were defendants. The decree

Opinion.

being adverse to the complainant, as such executor, he appealed. Opinion states the case.

Benjamin Haden, for appellant.

C. M. Lunsford, for appellees.

LEWIS, P., delivered the opinion of the court.

On the first day of June, 1888, Henry E. Smith executed the following paper, to wit: "\$1,000. This article is to signify that if Elliott Smith survive me, I bequeath him one thousand dollars of my property, free from any lien or incumbrance. To the above bequest I hereunto set my hand and seal the first day of June, 1888. (Signed) Henry E. Smith. [Seal]."

Elliott Smith was an orphan boy, between seven and eight years of age, at the time of the execution of this paper, and a member of Henry E. Smith's family.

On the second day of December, 1889, Henry E. Smith executed a will whereby he disposed of his entire estate, real and personal, without in any way referring either to Elliott Smith or to the paper just mentioned. He died in February, 1891, soon after which his will was duly admitted to probate. The bill was filed by the executor for a construction of the will and an administration of the estate; and the first question to be determined is as to the nature and effect of the paper writing of June 1, 1888. By the decree complained of the circuit court adjudged it to be a valid contract, to be treated as though it were a general pecuniary legacy in the testator's last will and testament.

Upon careful consideration we are unable to concur in this view. There is no element of contract about it; and the evidence returned by the master with his report fails to establish a contract. The paper was evidently intended as a will, which was revoked by the subsequent incompatible will disposing of

Opinion.

the whole estate. The only evidence on the subject of the alleged contract is the deposition of an illiterate woman, who says she heard the testator remark to his wife that if she would "fetch the child back, he would will him a thousand dollars." The child, it seems, had been taken care of by the testator from its infancy, and shortly before the 1st of June, 1888, Mrs. Smith left his house, and took the child with her to an adjoining county. It was to induce her to return it that his promise to leave it a sum of money was made. But it is not shown that she was authorized to contract for the child, or that she had any legal control over it. It seems, moreover, that the testator, after writing the paper, put it in a Bible in the house, and told his wife to take care of it till his death.

What afterwards became of the child does not appear, and the evidence as to the value of its services is extremely weak. It is true the widow was examined as a witness in support of the theory of a contract founded on valuable consideration, but her competency as a witness was objected to, and the objection was unquestionably well founded, although the coverture had ended. 1 Greenl. Ev., sec. 337; *William & Mary College v. Powell*, 12 Gratt., 372; *Smith v. Bradford*, 76 Va., 758.

That a person may make a valid contract to make provision for another by will is not disputed; but, as was held in *Rice v. Hartman*, 84 Va., 251, the evidence to establish such a contract must be clear and convincing.

The next question relates to the Beale debt. This debt amounted to something over sixteen hundred dollars, and was evidenced by bond, payable to the testator. About one-half of this debt was assigned by the testator in his lifetime to Swann, and for the residue, which Swann collected, the contention is that Swann agreed to pay the testator an annuity of \$168 13 during his life. The circuit court, however, refused to credit Swann with the residue of the debt, but charged him with it as executor of Smith. This branch of the decree was especially assailed in the argument at the bar; but as the ap-

Opinion.

peal from the decree was taken by Swann in his representative capacity (*i. e.*, as executor), and as the estate is not aggrieved, the question whether he is aggrieved in his individual capacity cannot be considered. That a decree, though erroneous, will not be disturbed at the instance of an appellant not prejudiced thereby, is a proposition too well settled in this State to require the citation of authority.

The next and last question discussed at the bar is whether the real estate devised by the residuary clause of the will should be subjected for the payment of debts before calling for contribution from the specific legacies.

The well settled general rule is that the personal estate is the natural and primary fund for the payment of debts, and must first be exhausted before the real estate can be made liable; nor will it be exonerated by a charge on the real estate, unless there be expressed words, or a plain intent, in the will to make such exoneration.

In the present case no such intent appears, and the case is, therefore, governed by the general rule.

HINTON, J., dissented.

DECREE AFFIRMED IN PART AND REVERSED IN PART.

Richmond.

BARKER v. COMMONWEALTH.

DECEMBER 20th, 1894.

1. CRIMINAL PROCEEDINGS—*Seduction—Evidence.*—At trial for felonious seduction, *held*, the character of the house—whether of ill or good repute—where prosecutrix resided prior to her alleged seduction, may be proved by evidence of particular facts, not the conclusions of the witness, and not by general reputation.
2. IDEM—*Compromise—Instructions.*—At such trial the jury were instructed that no compromise between the parties, or any one else, could bar the prosecution: *HELD*: No error; nor is an instruction in the language of the statute, Code, § 3677.
3. IDEM—*Duty of jury—Instruction.*—It being no more the duty of the jury to endeavor to acquit than to convict, an instruction that the jury should endeavor to reconcile all the evidence with the presumption of the innocence of the accused: *held*: properly denied.
4. IDEM—*Chastity—Burden of proof.*—In a prosecution for felonious seduction, the chastity of the prosecutrix is presumed by the law, and the burden of impeaching it lies on the accused.
5. IDEM—*Venire facias.*—The jury for the trial of a felony must be brought in under a writ of *venire facias*, and the failure of the record to show that fact: *held*: reversible error. *Myers v. Commonwealth*, ante p. 785.
6. *Quere* as to the extent to which the testimony of the prosecutrix must be supported by other evidence under Code, § 3679, in order to sustain conviction of accused. *Hausenstuck's Case*, 85 Va., 802.

Error to judgment of county court of Henry county, pronounced November 22, 1892, in a prosecution against the plaintiff in error for seduction; a writ of error having been refused by the judge of the circuit court of that county. Opinion states the case.

Opinion.

S. A. Anderson and W. H. Gravelly, for plaintiff in error.

Attorney-General R. Taylor Scott, for commonwealth.

LEWIS, P., delivered the opinion of the court.

The prisoner was indicted and convicted, under section 3677 of the Code, for the seduction, under promise of marriage, of the prosecutrix, an unmarried female of previous chaste character. Numerous exceptions were taken to rulings of the court during the progress of the trial, which, so far as it is necessary to notice them, will be considered in the order in which they are presented.

1. The first relates to the exclusion of evidence offered by the defendant to show the character of the house—whether as a house of ill or good repute—at which the prosecutrix resided prior to her alleged seduction. It is contended that the evidence ought to have been received as relevant to the question of the previous chaste character of the prosecutrix, which was directly in issue. But we are of opinion that the character of the house could not be shown by general reputation, but only by proof of particular facts. *Kenyon v. People*, 26 N. Y., 203.

2. At a subsequent stage of the trial a witness for the defendant was asked to state to the jury from facts within his own knowledge whether the house was “a bawdy house or a house of respectability,” whereupon the attorney for the commonwealth objected, and the court sustained the objection, but said the witness might be asked to state whether any one visited the prosecutrix at her mother’s home, or anywhere else, for the purpose of prostitution or lewdness. Counsel for the prisoner declined to ask the latter question, and excepted to the ruling of the court. We are of opinion that the exception is not well taken. The first question was altogether too general. The witness ought to have been asked to state facts, and not his own conclusions.

Opinion.

3. The subject of the next assignment of error is the action of the court in instructing the jury that no compromise between the prosecutrix and the prisoner, or any one else, could bar a prosecution by the commonwealth for the crime charged in the indictment. There was no error in this instruction. *State v. Deitrick*, 51 Iowa, 467.

4. The court also instructed the jury that if they believed from the evidence beyond a reasonable doubt that the prosecutrix was an unmarried female of previous chaste character at the time of her alleged seduction, and that she was seduced by the prisoner by having illicit connection with her under promise of marriage, they should find him guilty. This instruction is substantially in the language of the statute, and propounds the law correctly. Illicit connection accomplished by means of a promise to marry, in a case like the present, constitutes the offence charged in the indictment, and made punishable by the statute. *Kenyon v. People*, 26 N. Y., 203; *Boyce v. People*, 55 *Id.*, 644; *State v. Heatherton*, 60 Iowa, 175.

5. Among the instructions offered by the prisoner was the following, viz.: "The court instructs the jury that the prisoner comes to trial presumed to be innocent, and this presumption extends to the close of the trial; and the jury should endeavor to reconcile all the evidence with this presumption." In lieu of this the court instructed the jury that "the prisoner comes to trial presumed to be innocent, and this presumption continues until it is rebutted by the commonwealth beyond a reasonable doubt; and the jury cannot convict unless they can reconcile from the evidence the guilt of the prisoner with all the necessary allegations of the indictment."

There was no error in this ruling. The instruction offered by the prisoner was calculated to mislead the jury. It was the duty of the jury to weigh the evidence carefully, and to pass upon it dispassionately, and to give the prisoner the benefit of any reasonable doubt; but it was no more their duty to endeavor to acquit him than to convict him.

Opinion.

6. Nor was there prejudicial error in giving, in lieu of another instruction offered by the prisoner, the following instruction, viz.: "Although the jury may believe from the evidence beyond a reasonable doubt that the prisoner had illicit connection with the prosecutrix under promise of marriage, and may have thought at the time that she was a female of previous chaste character, yet they must find him not guilty if they believe she was unchaste at the time of said seduction."

It was argued at the bar in this connection, that it devolved upon the commonwealth to prove affirmatively, in order to convict the prisoner, that the prosecutrix was of previous chaste character, and that the jury ought to have been so instructed. But such is not the law. On the contrary, chastity is presumed, and the burden was on the prisoner to impeach it. *People v. Clark*, 33 Mich., 112; *Polk v. State*, 40 Ark., 482; *State v. McClintic*, 73 Iowa, 663; *Wilson v. State*, 73 Ala., 527. In *People v. Brewer*, 27 Mich., 134, Judge Cooley, speaking for the court, said: "The last error we shall notice is, that the court erred in instructing the jury that the law presumes a woman to be chaste until the contrary is shown. We believe this instruction to be correct. The presumption of law should be in accordance with the general fact; and whenever it shall be true of any country that the women, as a general fact, are not chaste, the foundations of civil society will be wholly broken up. Fortunately in our country an unchaste female is comparatively a rare exception to the general rule; and whoever relies upon the existence of the exception in a particular case should be required to prove it."

7. The statute, however, provides (sec. 3679) that no conviction shall be had upon the testimony of the female seduced, unsupported by other evidence; and it was earnestly contended at the bar that the conviction in the present case is not warranted by the evidence.

The statutes of the several States generally require that the evidence of the woman be corroborated before a conviction

Opinion.

can be had; but the statutes and decisions differ as to the extent of the corroboration necessary. In some jurisdictions every material fact must be corroborated, while in others it is sufficient if the corroboration extends to the promise of marriage and to the intercourse, or to the promise alone. In New York, whose statute is similar to ours, the established rule is that the corroboration need extend only to the promise and the intercourse, and that the supporting evidence need be such only as the character of these matters admits of being furnished. 21 Ency. of Law, tit. "Seduction," 1051; *Kenyon v. People*, 26 N. Y., 203; *Armstrong v. People*, 70 *Id.*, 38.

In *Hausenfluck's Case*, 85 Va., 702, it was said that to convict the accused the woman must be corroborated, but to what extent was not decided, because in that case there was, in fact, corroborating evidence on every point. And it is unnecessary to decide the question or to review the evidence, in the present case, because, as was pointed out at the bar, it is not shown by the record that the jury that tried the case were legally summoned; that is to say, that they were brought in under a writ of *venire facias*; for which essential defect in the record the judgment must be reversed, and the case sent back for a new trial; the case in this particular being ruled by what was decided in the case of *Myers v. Commonwealth*, ante p. 785.

JUDGMENT REVERSED.

Richmond.

ASTON'S ADM'R v. KENDRICK AND ALS.

DECEMBER 20th, 1894.

MARRIED WOMEN—Exchange—Fraud—Relief—Case at bar.—Previous to 1877, Mrs. K. owned land in fee, and she and her husband conveyed it to P., taking his bonds payable to K.; and the same day bought the "Cassell place," K. executing his bonds for the price, with P. and A. as sureties, the latter being privy to the fact that the sale and purchase were one transaction. P.'s bonds were assigned to A., who agreed to apply them to the Cassell purchase money, but instead, applied them to a debt due himself from K. The "Cassell place" was sold for the unpaid purchase money :

HELD :

1. The sale of Mrs. K.'s land did not amount to a conversion thereof into personalty, but the sale and purchase was one transaction, as to these parties, and constituted an exchange of lands.
2. K. owned a life estate in his wife's land whilst she was entitled to the reversion thereof.
3. The application of the bonds of P. to the debt due A. from K. instead of to the Cassell purchase money, was a fraud upon Mrs. K.'s right to the extent of the value of her reversion in her land, and the estate of A. is liable to her therefor.

Appeal from decree of circuit court of Washington county, rendered May 28, 1891, in a chancery cause wherein Mrs. M. E. Kendrick, by her next friend, was complainant, and W. H. Aston, administrator *de bonis non* of A. W. Aston, deceased, was defendant. The decree being adverse to the defendant, he appealed. Opinion states the facts.

Daniel Trigg and Honaker & Huttin, for appellant.

Opinion.

Geo. W. Ward and J. S. Ashworth, for appellee.

FAUNTLEROY, J., delivered the opinion of the court.

It appears from the record that the complainant in the court below, M. E. Kendrick, was M. E. Price before her marriage to H. F. Kendrick, and inherited from her father, John W. Price, deceased, a tract of land in Washington county, of which she seized in fee as her maiden land, when she became the wife of H. F. Kendrick in the year —, prior to 1887, in which, under the common law, her said husband acquired his marital rights. He was a merchant, of the firm of Kendrick & Aston, composed of H. F. Kendrick and A. W. Aston, having their place of business at Cedarville, in Washington county, some distance from the residence of the said H. F. Kendrick and his wife. There was a tract of land, known as the Cassell tract, belonging to the estate of Adam Cassell, deceased, situated near to Cedarville (the place of business of Kendrick & Aston), which was for sale, under the will of Adam Cassell. Mrs. M. E. Kendrick desired to sell her maiden land and to invest the proceeds in the purchase of this Cassell tract, so as to have a residence near Cedarville and convenient to her husband's place of business; in which wish and purpose her said husband, H. F. Kendrick, concurred. And accordingly she requested and instructed him, the said H. F. Kendrick, to sell her said tract of maiden land and to invest the proceeds of said sale in the purchase of the Cassell tract. To carry out this purpose and plan, she and her husband united in a sale of her said maiden land on the 28th of February, 1871, to William H. Price, the brother of Mrs. Kendrick, for \$5,000, for which the said W. H. Price executed his three single bills of that date, payable to H. F. Kendrick at twelve, twenty-four, and thirty-six months, respectively. On that same day, viz, February 28, 1871, the Cassell tract was sold, and bought by the said H. F. Kendrick, for which he executed his three single

Opinion.

bills, with said W. H. Price and A. W. Aston as sureties, and payable to Samuel A. Cassell, executor of Adam Cassell, deceased, in equal instalments of \$2,075 in twelve, eighteen, and twenty-four months. All these said transactions of sales and purchase were at her request and by her instructions, with the concurrence of her husband, H. F. Kendrick, to carry into effect their purpose aforesaid, as one transaction for the exchange of the said two tracts, her maiden land and the Cassell land. And they were all done with the privity and knowledge of the said Kendrick, W. H. Price, her brother, and of A. W. Aston, who was brother-in-law and partner of H. F. Kendrick, and all of them obligors on the bonds for the purchase money of the Cassell tract—W. H. Price being also the purchaser of Mrs. Kendrick's said maiden tract. The said H. F. Kendrick and wife made a deed conveying her maiden land to W. H. Price, but no deed was made for the Cassell tract. But Mrs. Kendrick took possession of the Cassell tract, and made improvements thereon; and she sold forty acres of it to E. V. Moore for \$1,225 to pay (as she did pay therewith) the difference between the sale prices of her maiden land and the Cassell tract, to the executor of the Cassell estate.

The three bonds of W. H. Price for the purchase money of Mrs. Kendrick's maiden tract were transferred to A. W. Aston (one of the obligors on the bonds for the purchase of the Cassell tract), to be applied by the said transferee, A. W. Aston, to the discharge of the bonds for the Cassell tract, which bonds of W. H. Price for the maiden land were paid to A. W. Aston; but the said A. W. Aston did not, nor did his legal representative, apply the same to the payment of the bonds for the Cassell tract; but he applied them to the payment of the personal debts of H. F. Kendrick to himself. The Cassell tract not having been paid for, was subsequently sold for the default, and Mrs. Aston, the widow of A. W. Aston, became the purchaser.

A. W. Aston had died, and W. B. Aston became his admin-

Opinion.

istrator; and on the death of W. B. Aston, W. H. Aston (the appellant here) became administrator *d. b. n.*

This suit was brought by appellant, Mrs. M. Kendrick, by R. N. Price, her next friend, against Mrs. E. E. Aston (widow of A. W. Aston), W. H. Aston in his own right, and as administrator *d. b. n.* of A. W. Aston; the heirs of A. W. Aston, and H. F. Kendrick, for the conveyance to her of the Cassell land which Mrs. E. E. Aston bought at the last sale, or to have the proceeds of the sale of Mrs. M. E. Kendrick's maiden land refunded to her.

After various proceedings—demurrers sustained, and amended bills, answers and depositions, and master's reports, corrected and confirmed—the circuit court entered its final decree, that the complainant, M. E. Kendrick, recover of W. H. Aston, administrator *d. b. n.* of A. W. Aston, deceased, \$2,441 30, with interest from 23d March, 1891 (the present value of the reversionary interest of Mrs. M. E. Kendrick in the proceeds of the sale of her maiden land), and that W. H. Aston, administrator *d. b. n.* of A. W. Aston, recover of H. F. Kendrick \$2,441 30, with like interest; and that complainants recover costs. From this decree this appeal is taken.

From the foregoing facts, disclosed in the record, it appears that the appellee, M. E. Price, was owner in fee of a tract of land, her maiden land, when she became the wife of H. F. Kendrick prior to 1877. That she and he both desired to exchange this tract for the Cassell tract, convenient to his place of business, and to this end she instructed her husband, H. F. Kendrick, to sell her said maiden land and to invest the proceeds in the Cassell land. That her said maiden land was sold to her brother, W. H. Price, on 28th of February, 1871, for \$5,000, for which he gave his three bonds payable to H. F. Kendrick. On the same day (and as part of the same aim and end) the Cassell tract was sold, and was bought by H. F. Kendrick, her husband, according to agreement and instructions from her, for the price of \$6,225, for which he executed his three bonds,

Opinion.

with W. H. Price and A. W. Aston as securities. It was in fact, and was so fully understood, that this was only an *exchange*, and that the maiden land of Mrs. M. E. Kendrick was to pay, *pro tanto*, for the Cassell land. A. W. Aston was privy to the transaction, and he was brother-in-law and partner in business with H. F. Kendrick and security on his bonds. H. F. Kendrick assigned the bonds of Price for the maiden land to A. W. Aston, amenable to the recognized equity of Mrs. M. E. Kendrick, and Aston took them with this knowledge; but instead of applying them to the payment of the Cassell land bonds, he applied them to the payment of a personal debt of H. F. Kendrick to himself, in fraud of Mrs. Kendrick's equity.

The court held rightly that A. W. Aston's estate is liable to her, and must refund to her the value of her reversionary interest in the proceeds of her maiden land.

The sale of Mrs. Kendrick's maiden land, under the circumstances detailed, does not, *ipso facto*, convert the proceeds into the absolute property of her husband, and make it liable to his debts either then existing or subsequently incurred. There was nothing in the mind of either Mrs. Kendrick or her husband contemplating a *conversion* of her land into personalty, but expressly the contrary. It was plainly the intent of both merely to effect an exchange or substitution of the Cassell land for her maiden land. And to this intent and endeavor A. W. Aston was a privy and one of the obligors on the purchase-money bonds for the Cassell land. The two sales were made *eo instanti* as parts of the same transaction, and amounted to an *exchange* as fully as if deeds had been mutually exchanged. The intent of all the parties to the transactions, fully proved by the direct evidence and by the circumstances, establishes simply a change of investment. The proof is conclusive that Mrs. Kendrick intended her land and its proceeds of sale for the purpose of investment in the Cassell land, to be and continue to be her realty. If her husband had intended aught

Opinion.

else, it would have been a fraud on her, which equity will not aid, either for the husband or for his creditors.

The decree appealed from is plainly right, and the judgment of this court is to affirm it.

DECREE AFFIRMED.

Richmond.

GRUBB AND ALS. v. STARKEY AND ALS.

DECEMBER 20th, 1894.

1. **EQUITABLE JURISDICTION—*Specific performance—Damages.***—Equity may enforce specific performance of a contract to do on plaintiff's property definite work, wherein he had a material interest, and there cannot be adequate compensation in damages; and may also, as ancillary, award damages for a breach of the contract.
2. **IDEM—*Ouster.***—Where the court has once acquired jurisdiction upon equitable grounds, no subsequent act of the defendants can oust that jurisdiction.
3. **IDEM—*Complete adjudication.***—When a court of equity has once acquired jurisdiction, it may go on to a complete adjudication, even to the extent of establishing legal rights and granting legal remedies, which would otherwise be beyond the scope of its authority. *Walters v. Farmers Bank*, 76 Va., 12.
4. **NON-RESIDENTS—*Judgments in personam.***—Where non-resident defendants who have been proceeded against by publication under attachment, appear and defend on the merits, judgments and decrees *in personam* may be entered against them.

Appeal from decree of circuit court of Botetourt county.
Opinion states the case.

Benj. Haden and *J. H. Lewis*, for appellants. .

J. H. H. Figgatt and *C. M. Lunsford*, for appellees.

LEWIS, P., delivered the opinion of the court.

Opinion.

This was a suit for specific performance. In April, 1887, the appellees conveyed to the appellants, defendants below, a tract of land containing about nineteen acres, adjoining the lands of the Lynchburg Iron Company, situate in Botetourt county. Below and contiguous to this land is a grazing farm owned by the appellees, which at the time of the conveyance to the appellants was mainly (if not solely) watered by a stream flowing through both tracts. The land was purchased by the appellants for the purpose of erecting and operating thereon an ore-washer. It was accordingly covenanted in the deed of conveyance that in case the said stream should be made continuously muddy by the proposed ore washing, so as to render the water therein unfit for stock, the appellants would lay a three-quarter inch pipe from a certain spring branch above, so as to conduct a supply of clear water over the land conveyed to a designated point on the appellee's farm, and there erect a trough for the use of stock.

The bill, which was filed in October, 1889, after setting out, substantially, the foregoing facts, alleges that this covenant has not been observed by the defendants; that they have not laid a pipe and erected a trough, as they covenanted to do, notwithstanding the water in the said stream has been continuously muddy and unfit for stock, in consequence of washing ore on the land, since the date of the conveyance, and although they have often been requested so to do. The bill also states that the complainants have been compelled, in consequence of the defendants' default, to drive their stock a considerable distance to water, whereby they have been greatly inconvenienced and damaged. And the prayer of the bill is that the defendants be required to specifically perform their covenant, and to make proper compensation to the complainants for the damage sustained by them, etc.

The defendants being non-residents, there was an order of publication. An attachment was also sued out, which was levied on the said nineteen acres of land.

Opinion.

At the May term, 1890, a decree was entered for the specific performance of the contract, with a further provision that the defendants pay to the complainants seven hundred and fifty dollars damages for the breach of the contract.

At the ensuing October term, the defendants appeared and filed their petition, praying that the decree be set aside, and that they be allowed to make defence. They thereupon, with the leave of the court, demurred to the bill, and also answered. In their answer they stated, among other things, that since the commencement of the suit they had laid the pipe and erected a trough, as they agreed to do, and that this was done before the decree was entered.

The cause was then referred to a commissioner, with directions to ascertain and report, among other things, what damages, if any, the complainants had sustained by reason of the alleged breach of the contract; in obedience to which decree the commissioner subsequently reported that they had been damaged to the amount of nine hundred dollars. This finding was afterwards, upon exceptions to the report, reduced by the court to seven hundred and fifty dollars; and by the same decree it was ordered that "performance of said contract be confirmed to the complainants."

1. A number of objections have been urged to this decree, none of which, in our opinion, are well founded. In the first place, the case stated in the bill is undoubtedly within the jurisdiction of a court of equity. The contract therein sought to be enforced is not one requiring personal labor, or the exercise of any peculiar skill or judgment, or involving the performance of continuous duties and supervision. On the contrary, it is such a contract as could be readily performed by almost any ordinary workman; and its nature is such that the remedy at law for its breach is inadequate.

This brings the case within the general rule that a court of equity has jurisdiction to enforce specific performance of a contract by a defendant to do defined work upon his own prop-

Opinion.

erty, in the performance of which the plaintiff has a material interest, and which is not capable of adequate compensation in damages; as, for example, an agreement on the part of a railway company to make an archway under its tracks, or to construct a siding at a particular point, for the convenience of an adjoining land-owner. 1 Story, Eq., sec. 721 *a*; *Storer v. Great Western Railway Co.*, 2 Y. & C. Ch., 48; *Green v. West Cheshire Railway Co.*, L. R. 13 Eq., 44.

It is, moreover, well settled that, as ancillary to its authority to decree specific performance, a court of equity may award damages for a breach of the contract, to be assessed either by an issue of *quantum damnificatus* or by a master, at its discretion. *Phillips v. Thompson*, 1 Johns. Ch., 131; *Nagle v. Newton*, 22 Gratt., 814; *Campbell v. Rust*, 85 Va., 653.

This, indeed, is not disputed. But the appellants contend that their performance of the contract in question before the entry of the decree, although subsequent to the filing of the bill, left nothing to be specifically enforced, and consequently that the ancillary power to decree damages was likewise at an end. In other words, the contention is that after the pipe was laid and the trough erected, the suit was nothing more than a suit to recover damages, of which equity has not jurisdiction. But this is a mistaken view. The court having acquired jurisdiction of the case upon equitable grounds, no subsequent act of the defendants could oust that jurisdiction. For it is a familiar principle, as laid down by Judge Staples in *Walters v. Farmers Bank*, 76 Va., 12, that when a court of equity has once acquired jurisdiction of a cause, it may go on to a complete adjudication, even to the extent of establishing legal rights and granting legal remedies, which would otherwise be beyond the scope of its authority. In that case the object of the suit was to subject the separate estate of a married woman to the payment of a certain negotiable note upon which the appellant was endorser, or to require the appellant to pay it. In the progress of the cause it appeared

Opinion.

that there was, in fact, no separate estate; whereupon it was insisted that as the supposed existence of a separate estate was the sole ground for going into equity, the court could proceed no further, and that the bill should be dismissed. But this view was rejected and a decree rendered against the appellant for the debt, which this court affirmed, on the principle above stated. So, it has been held that where the complainant was originally entitled to a specific performance, but pending the suit the subject-matter of the litigation is abstracted or destroyed, he will not be turned round to his remedy at law, but compensation or damages will be decreed him. 2 Story, Eq., sec. 794; *Nelson v. Bridges*, 2 Beav., 239; *Chapman v. M. R. &c. R. R. Co.*, 6 Ohio St., 119.

2. As to the further point made by the appellants in the petition for appeal, upon the authority of *Pennoyer v. Neff*, 95 U. S., 714, that State courts have no power to render judgments or decrees *in personam* against non-resident defendants who are summoned merely by publication, it is enough to say that here the defendants, after the rendition of the decree of May term, 1890, appeared and defended on the merits, thus submitting themselves to the jurisdiction of the court; so that the case stands upon the same footing, so far as the power and jurisdiction of the court is concerned, as if they had been personally served with process at the commencement of the suit.

3. Both sides complain of the amount of damages awarded; the appellants contending that the amount is excessive; while the appellees insist that the sum reported by the commissioner, viz.: nine hundred dollars, ought to have been allowed, and that the circuit court erred in reducing the amount to seven hundred and fifty dollars. Without reviewing the evidence before the commissioner, which is quite voluminous, and which we have carefully examined, we deem it sufficient to say that we see no reason to reverse or amend the decree on this or any other point. It is, therefore, affirmed.

DECREE AFFIRMED.

Richmond.

NORFOLK & WESTERN R. R. Co. v. MARSHALL'S ADM'R.

DECEMBER 20th, 1894.

CARRIERS—*Act of God—Liability—Case at bar.*—By the bursting of a water spout water accumulated at a fill in railroad track in a larger quantity than could be carried off by the stone culvert built there thirty-five years before and always regarded as safe, causing a washout and break in the track, into which, during a dark, stormy night, the engine and some of the cars of a passenger train were precipitated, without any negligence on the part of the carrier, and thereby a passenger came to his death : **HELD** : Carrier was not liable for the injury.

Error to judgment of circuit court of Bedford county, rendered June 10, 1893, in an action of trespass on the case for negligent killing, wherein W. F. Marshall was plaintiff and the Norfolk and Western railroad was defendant. The jury found for plaintiff and assessed his damages at \$7,500, and judgment was entered accordingly ; and the defendant brought the case here by writ of error. Opinion states the case.

Kirkpatrick & Blackford, for plaintiff in error.

Blair & Blair, for defendant in error.

LACY, J., delivered the opinion of the court.

The suit was instituted by the defendant in error against the railroad company to recover damages for the negligent killing of W. F. Marshall, a passenger, on the night of July 1, 1889.

Opinion.

It is admitted upon the record by the plaintiff that the accident by which his intestate was killed was caused by the act of God in the shape of an unprecedented storm. Thereupon the defendant company introduced no testimony and demurred to the evidence. The jury found a verdict for \$7,500, and the court, after hearing the argument, overruled the demurrer to the evidence, and gave judgment accordingly. Whereupon the defendant company applied for and obtained from this court a writ of error. The question as to how far the mere fact that an accident has occurred raises a presumption of negligence on the part of a carrier, which caused the injury in the case of a passenger, will not be discussed, because it was conceded by the plaintiff below that the accident was caused by the act of God. See *Curtis v. Rochester & S. R. R. Co.*, 18 N. Y., 534, and the General Doctrine, pp. 197 and 212, Thompson's Carriers of Passengers; *R. R. Co. v. Reed*, 10 Wall., 176; *Gillespie v. St. L. R., &c., R. R. Co.*, 6 Mo. App., 554; *Long v. Pa. R. R. Co.*, 147 Pa. St., 343; *Trans. Co. v. Downe*, 11 Wall., 130; *Segalls v. Bells*, 43 Am. Dec., 363.

But it is claimed by the defendant in error that the consequences of this act of God could have been prevented by the use of ordinary diligence on the part of the defendant company, and this can only be determined from the evidence in the case which shows that the accident occurred on a dark and rainy night, the rain pouring at times in torrents and flooding the track, which was laid along the side of the Blue Ridge mountains, causing stoppages from time to time at exposed places.

Before the train reached the place of the accident the rain ceased, and the train had reached a portion of the track which had always been regarded as perfectly safe. The character of the watershed was such that the water ran rapidly off along the mountain side, and the train proceeded on its way without further obstruction. The train at last reached the place of the accident, which was a dirt fill, provided with a stone culvert

Opinion.

for the outlet of the water from the hillside above. This culvert was built thirty-five years before on the construction of the road, from which there had never been any accident. It was very dark and the train ran upon the fill; no one suspected evil; the engine crossed and its nose reached the embankment on the other side, when by reason of what is called a water-spout, the culvert had proven insufficient to carry the water off; a great pond had been formed above the fill and the water bored the fill out, leaving the rails and ties of the track unbroken. The train went down into the water, which, deprived of its support, formed a sort of cataract; a large number of persons were injured, among them the defendant in error's intestate, who was killed.

The contention of the defendant in error is, that the speed of the train was recklessly rapid and it hurled the mail car clear across on the opposite side, but the fact is the whole train did not go on the embankment, some of the cars stopped when the accident occurred and were wholly uninjured, and there is nothing whatever in the evidence which is adduced by the defendant in error only which shows any negligence on the part of the company. The circuit court erred in overruling the demurrer to the evidence of the defendant company, which should have been sustained, and this judgment must be reversed and annulled for the reasons stated, and this court will render here such judgment as the said circuit court ought to have rendered.

JUDGMENT REVERSED.

Richmond.

GEORGE & ALS. v. BATES & ALS.

DECEMBER 22d, 1894.

DEEDS—*Description of land*.—A description consisting only of the words, "A piece of land near Bacon Quarter Branch," held, too vague and indefinite to create a right of property in any particular parcel of land. *U. S. v. King*, 3 How., 787; *Westfalls v. Cottrells*, 24 W. Va., 763.

Appeal from decree of chancery court of city of Richmond, rendered December 13, 1890, in a certain cause wherein Henry Bates and others were complainants and John P. George, M. B. Brown, and others were defendants. The decree being adverse to the defendants, they appealed. This cause is a sequel to the cause of *Bates & als. v. Brown & als.*, 80 Va., 126. Opinion states the case.

John Dunlop and *Leigh Robinson*, for appellants.

J. H. W. Peplow and *Hill Carter*, for appellees.

HINTON, J., delivered the opinion of the court.

This suit in equity was instituted in 1874 by the plaintiffs, the present appellees, to have certain lots, which are specifically enumerated in a deed of trust of October 28, 1824, from the grantor, James Brown, Sr., to Copeland, Macmurdo & Burton, trustees, as lots in Duval's addition, numbered 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, * * 163, 164, &c., released from the obligation of said trust.

Opinion.

They, the plaintiffs, say that the said Brown, who was a man of large property, subsequently, to wit, on the 6th of August, 1825, executed another trust deed to Charles Copeland, Robert Burton, and Samuel Taylor, trustees, as additional security to James Scott, executor of John Leslie, deceased; that in this latter deed two classes of property are conveyed; that the first class comprises unencumbered property, which is conveyed with particular description; that in the second class is contained several parcels of encumbered lands, which are described in the most general terms; and they insist that the twenty-six acres now in dispute were conveyed in this last mentioned deed of trust by the words: "All the interest of every description that may result to the said James Brown * * in a certain piece or parcel of land near Bacon Quarter branch * * * after the execution of a prior deed thereon."

To the bill there was a demurrer and answer; and upon the hearing the chancery court of the city of Richmond dismissed the bill of the plaintiffs, Bates and others. Whereupon an appeal was taken to this court.

In January, 1885 (see 80 Va., 126), this court rendered its decision, holding, in effect, that when a bill presents a case meet for equity, and exhibits are filed tending to support such a case, and the answer denies the identity of the property claimed by the plaintiff with the property which had been conveyed, it is error for the court to determine the question of identity on the pleadings and exhibits without giving the parties full opportunity to take all desired testimony.

The cause was remanded then for the purpose of allowing all the evidence to be adduced and to be determined upon the merits.

In obedience to mandate of this court the chancery court made the necessary order of reference to one of its commissioners, who reported that the said Samuel Taylor, the surviving trustee in the deed of August 6, 1825, sold the said twenty-six acres on Bacon Quarter branch.

Opinion.

To this report the defendants excepted, but the chancery court overruled their exceptions, and ordered said twenty-six acres to be released to the plaintiffs. In this we think the court below manifestly erred.

The claim of the plaintiffs is that in May, 1844, the surviving trustee in the deed of August 6, 1825, offered for sale "by virtue of a deed of trust from the late James Brown to the undersigned, * * * a certain piece or parcel of land near Bacon Quarter branch." That this property, at the sale which ensued, was bought by T. F. Crew for the sum of \$5 50 and by him sold on the 27th February, 1854, for the consideration of \$1 to Micajah Bates, the ancestor of the plaintiffs. And that this piece or parcel of land, thus acquired, contains twenty-six acres and is the identical property conveyed by the trust deed of 1824, as lots in Duval's addition numbered as 151, 152, &c. Now it may well be questioned, as has been done by the learned counsel for the defendants, whether "A description which consists only of the words: a piece or parcel of land near Bacon Quarter branch," is too vague and indefinite to create a right of private property in any particular parcel of land, which could be maintained in a court of justice. *U. S. v. King*, 3 How., 787. And this was manifestly the view of this court when it sent the case back for testimony to be taken, for it had then all the advantages to be derived from the deeds which were before it, and if the lights derived from the deeds had been sufficient to identify the property, there would have been no necessity for sending the case back. "To give a deed any sensible operation, it must describe the subject matter of the conveyance, so as to denote, upon the instrument, what it is in particular, or by a reference to something else which will render it certain. The want of such a description or reference in a deed is a defect, which renders it totally inoperative." *Kea v. Robeson*, 5 Ired. Eq., 373.

And in the case of *Dickens v. Barnes*, 79 N. C., 490, the court says: "A deed conveying land and describing it as 'one

Opinion.

tract of land lying and being in the county aforesaid, adjoining the lands of A and B, containing twenty acres more or less,' does not constitute color of title, and possession under it is not adverse. Such description is insufficient and cannot be aided by parol proof." See, also, 5 Jones, Eq., 155; *Westfalls v. Cottrills*, 24 W. Va., 763; *Clark v. Chamberlain*, 112 Mass., 19; *Lumbard v. Aldrich*, 8 N. H., 31.

It may then well be doubted whether the description relied on in the present case passed any title to Samuel Taylor, and if they did not, of course none could be transmitted by him.

But passing from this point, the evidence, instead of strengthening the plaintiff's case, shows that Mr. Taylor himself could find no such land, and that such was the growing uncertainty with regard to this claim that although it was bought in 1844 for the pitiful sum of \$5 50, it sold ten years afterwards—notwithstanding the presumed enhancement in the value of real estate—for only one dollar. Without going more into detail, we think it sufficient to say that the twenty-six acres claimed by the plaintiffs has not been identified as the property conveyed in the deed of 1824, and that the decree of the chancery court must be reversed and the plaintiff's bill must be dismissed.

DECREE REVERSED.

Richmond.

LEWIS v. COMMONWEALTH.

DECEMBER 22d, 1894.

1. SELLING LIQUOR—*Code*, § 534.—Under said section a single sale of liquor without a license is a violation, as the law is not limited to persons engaged in carrying on the traffic.
2. *IDEM*—*Joinder of offences*—*Case at bar*.—The indictment in this case contains ten counts, each charging a sale to a different person, which constitutes separate and distinct offences: **HELD**: The demurrer was properly overruled.
3. INSTRUCTIONS—*Evidence*.—Where there is no evidence tending to support an instruction that is asked for, *held*, it is properly denied.
4. CASES COMPARED.—*Piedmont Club v. Commonwealth*, 87 Va., 540, distinguished from case at bar.

Error to judgment of circuit court of Accomac county, rendered October 13, 1892, affirming judgment of county court of said county, rendered in accordance with the verdict of the jury in a prosecution of the plaintiff in error, one Franklin C. Lewis, whereby he was sentenced to pay three fines of \$100 each and to be imprisoned in the county jail for the period of thirty days. Opinion states the case.

Quinby & Quinby and *Blackstone & Benedick*, for plaintiff in error.

Attorney-General R. Taylor Scott, for the commonwealth.

HINTON, J., delivered the opinion of the court.

Opinion.

The court is of opinion that there is no error in the judgment of the circuit court rendered in this case.

The defendant was tried upon an indictment containing ten counts, charging him with unlawfully selling wine, ardent spirits, malt liquors, or a mixture thereof, to be drunk at the place where sold, without first having obtained a license therefor according to law, and each of these counts, except the fifth and sixth, which are not involved in this appeal, charges a sale to a different person, and constitutes a separate and distinct offence.

The counts are couched in the usual formal language adopted in such cases, and advised the defendant fully of the specific charges he was called upon to answer, and the demurrers thereto were properly overruled.

The evidence, which is certified, clearly establishes the charge set out in this the third count of the indictment, but argued that the circuit court erred in sustaining the county court in its refusal to grant two instructions asked by the defendant.

This, however, is not so. There is no evidence in the record to which either of the instructions is applicable, and they should not have been given.

The law requiring a license for the sale of liquor is not restricted to *persons who are engaged in carrying on the business of selling liquor*, for a single sale violates the law and renders party liable to punishment. Nor is there anything in *The Piedmont Club v. Commonwealth*, 87 Va., 540, which countenances a different view.

The judgment of the circuit court of Accomac is affirmed.

JUDGMENT AFFIRMED.

Richmond.

ANNE E. B. SLATER v. CHARLES H. SLATER.

DECEMBER 22d, 1894.

Absent, Lacy, J.

1. CUSTODY OF CHILDREN—*Doctrine*.—The future welfare and interest of the child is the paramount consideration as respects its custody against the claims of either or both of its parents, and notwithstanding a statute recognizing the superior rights of the father.
2. *IDEM*—*Case at bar*.—Where the father, though not very affectionate, is yet thoughtful and solicitous for the personal and spiritual welfare of his family, and successful in business and able to provide for them, whilst the mother, though affectionate, is dependent on her parents for support: **HELD**: The children must be committed to their father.

Error to judgment of circuit court of city of Williamsburg and county of James City, rendered June 23, 1891, at a special term, upon a writ of *habeas corpus* sued out by the defendant in error, Charles H. Slater, directed to his wife, Anne E. B. Slater, alleging that she had abandoned him and taken with her their three infant children, the eldest not being seven years of age, and was unlawfully and without his consent detaining them, and refused to deliver them up to him. The circuit court, by its judgment, ordered the children to be surrendered to their father, and from said judgment their mother brought the case here upon writ of error. Opinion states the case.

J. F. Hubbard, for plaintiff in error.

Opinion.

C. A. Branch and E. B. Slater, for defendant in error.

HINTON, J., delivered the opinion of the court.

The record of this case shows that on the 27th day of August, 1890, Charles H. Slater obtained from the Hon. W. G. W. Farthing, judge of the county court of York county, a writ of *habeas corpus ad subjiciendum*, commanding the respondent, his wife, Anne E. B. Slater, to appear before the said judge at Williamsburg on the 3d of September, and bring with her the bodies of their three infant children, Grace E., Charles H., and W. B. Slater, together with the cause of their detention, &c. The said judge having fully heard the matter, on the 26th of September, 1890, entered a judgment directing that the said children be remanded to the custody of the said Anne E. B. Slater, and that the writ be dismissed at the cost of the relator.

The case was heard in vacation, and during the trial several bills of exception were taken by the relator, none of which need be referred to, as in our opinion the case turns not on an inquiry as to what are the facts, but what is the conclusion to be drawn from the facts which sufficiently appear, whether the certificate of facts or the certificate of evidence, or both, be looked at.

From the judgment of the county judge an appeal was taken to the circuit court, which court reversed the judgment of Judge Farthing, and directed the children to be delivered up to the said Charles H. Slater; and from this last-mentioned judgment the case has been brought here.

It clearly appears by the record that the parents have lived unhappily almost from the time of their marriage, and that this condition of things was brought about by the refusal of the wife to cohabit with the husband, and a suspicious disposition on the part of the husband.

While such have been the relations of the parents, it also

Opinion.

appears that Mrs. Slater has been a most affectionate and devoted mother, and that Mr. Slater has been a sober and successful business man, providing for the wants of his family, but given to outbursts of temper when thwarted by his wife.

He seems to have broken up his home, but both he and the grandparents of the children with whom they are residing are able and willing to provide for these infants, who at the time of the institution of this proceeding were, respectively, six, four, and two years old.

Under these circumstances should the children be left with the mother or restored to the father, whose treatment of his wife has been at times both harsh and injudicious?

In the Amer. and Eng. Encyl. Law, vol. IX., p. 243, it is said: "Rights of the father to the custody of his children are not so absolute in this country as in England. Where each is blameless, the father is entitled to the custody of his children. But the courts adopt the equitable principle that this right must yield to considerations affecting the welfare of the children. * * * * *

The later and better doctrine now generally recognized with respect to contentions among relatives for the custody of infants, is that the future welfare and interest of the child is the paramount consideration, even as against the claim of either or both of its parents; and notwithstanding a statute recognizing the superior rights of the father."

Now, this being in brief the law applicable to the case, the only question is whether the interests of these infants will best be subserved by committing these children to the care and custody of their father, who is their natural guardian, and who, if he is not shown to be an extremely affectionate person, is shown to be a thoughtful and provident person, solicitous for the personal and spiritual welfare of his family, and able to provide for them, or by leaving them in the custody of their mother, who is herself dependent on her parents for her sup-

Opinion.

port. Upon this point we think there can be but one answer, and that in favor of committing them to their father.

In the opinion of this court the judgment of the circuit court is right and must be affirmed.

JUDGMENT AFFIRMED.

Richmond.

CHAPPELL v. TRENT.

DECEMBER 7th, 1893.

1. *WILLS—Capacity—Undue influence—Instructions.*—It is error in a suit to set aside a will for testamentary incapacity and undue influence, to refuse an instruction asserting that undue influence is any means employed with the testator, which, under the circumstances, he cannot well resist and which induces him to do what otherwise he would not do.
2. *IDEM—Misleading.*—An instruction that the influence to vitiate a will must amount to force and coercion obstructing free agency, and not the mere influence of affection and attachment nor mere desire of gratifying another's wishes, is misleading as being calculated to impress the jury that only physical force or threats of personal violence would be sufficient to vitiate a will, and is erroneous.
3. *IDEM—Assumption of facts.*—It is error to give an instruction ignoring the question of testamentary capacity, and thus assuming its existence, and suggesting that unless it be shown that the will was the result of irresistible importunities, or was made purely for the sake of peace, it must be upheld.
4. *IDEM—Previous declarations.*—An instruction assuming that the provisions of a will accord with testator's affections and previous declarations is erroneous where it devises all of testator's property to persons not related to him, and is contrary to his previous declarations to the effect that he did not intend to make any will, and he is not shown to have had any affection for such beneficiaries.
5. *IDEM—Burden of proof.*—Beneficiaries, no kin to a testator eighty-five years old, of greatly impaired health and enfeebled mind, and in their custody, and away from his next of kin, and induced by them or his attending physician to devise to them his entire estate, have the burden of clearly proving that the will was his free and voluntary act.
6. *WILLS—Evidence of testamentary capacity.*—That a testator had sufficient mind to answer ordinary questions is not evidence of testamentary capacity if he did not have sufficient active memory to collect in his mind, with-

Syllabus.

out prompting, particulars of the business to be transacted and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other and to be able to form some rational judgment in relation to them.

7. *IDEM—Opinion of subscribing witnesses.*—The mere statement of subscribing witnesses that testator knew what he was doing is not sufficient proof of testator's capacity to entitle the will to be proved, where the proof shows that in fact he did not recognize either of them upon their coming into his room, and that no word passed between them, and that to all appearances testator was unconscious of their presence.
8. *IDEM—Opinion of attending physician.*—Testamentary capacity is not established by the opinion of the attending physician alone that testator was mentally competent when he executed the will, where there are numerous facts at and before its execution tending to show the contrary, and such physician's testimony is itself inconsistent, and he states that he is in doubt as to what constitutes mental competency, and would rather state the circumstances, and such circumstances as stated by him indicate lack of a sound disposing mind and memory.
9. *IDEM—Testing capacity.*—A will will be set aside as having been obtained by undue influence where, at the time of its execution, the testator was weak, feeble, and nearly unconscious, and it was more the will of his attending physician who drew it, and urged its execution, than of testator, and who wholly omitted his duty of testing testator's mental capacity before taking part in procuring its execution.
10. *IDEM—Verdicts.*—A verdict sustaining a will will be set aside where facts and circumstances before and at time of executing the will clearly show want of testamentary capacity, and that the will was not the testator's free and voluntary act, and the verdict can be accounted for only on the ground of reliance upon instructions clearly erroneous.
11. *IDEM—Presence of subscribing witnesses.*—The presence of the subscribing witnesses required by the statute is a presence of which testator is conscious, and not that they be merely present together and that testator is looking straight at them, where he does not recognize them, and, instead of his requesting them to attest his will, or their asking him if he desires them to do so, he appears utterly unconscious of their presence.
12. *IDEM—Signature of testator.*—An instruction that a will is invalid unless in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to manifest that the name is intended as a signature, and unless it be wholly written by the testator, the signature must be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time, and such witnesses must subscribe the will in testator's presence,

Syllabus—Statement—Opinion.

is in accordance with the statute and covers the whole ground, and any addition to the effect that such direction need not be in any particular form, but may be given by testator spontaneously or at the suggestion of another, should not be given.

13. *IDEM*—*Case at bar*.—In case here after minute consideration of the facts attending the execution of the paper and of the testimony of one of the beneficiaries and of the subscribing witnesses, *held*, there was a failure to prove that testator was at the time possessed of a sound mind and disposing memory, and that therefore said paper was not his true last will and testament.

Appeal from circuit court of Bedford county, rendered in a cause wherein Josiah Chappell and many others, the heirs-at-law of Richard T. Chappell, deceased, were complainants, and Elizabeth Mc. Trent and Edward T. Trent were defendants. The purpose of the suit was to annul the alleged will of the decedent. At the trial of the issue of *devisavit vel non* the jury brought in a verdict sustaining the will, and the complainants, (defendants in said issue) moved for a new trial, which being denied and a decree entered in accordance with the verdict, the said complainants appealed. Opinion states the case.

James G. Field, Kirkpatrick & Blackford, and John M. Payne, for appellants.

R. G. H. Kean and M. P. Burks, for appellees.

RICHARDSON, J., delivered the opinion of the court.

The object of this suit was to annul and set aside as invalid a certain paper writing executed on the 17th day of June, 1890, and purporting to be the last will and testament of the said Richard T. Chappell, which paper had been admitted to probate, *ex parte*, by the county court of Bedford county at the July term thereof, 1890.

The circuit court of Bedford made an order in the cause, directing an issue *devisavit vel non* to be tried at its bar, in

Opinion.

which the defendants, Edward Trent and Eliza Trent, should be plaintiffs, and the plaintiffs in the cause should be defendants. The cause came on and the issue was tried at a special term of the circuit court of Bedford county, continued and held for said county, on the 1st day of September, 1890, when the jury found the following verdict: "We, the jury, find that the paper writing in the bill and proceedings mentioned, dated the 17th day of June, 1890, purporting to have been signed by Richard T. Chappell, by T. W. Nelson, and attested by Charles H. Terrell and Joseph M. Crank, which was admitted to probate *ex parte* in the county court of Bedford county on the 28th day of July, 1890, as the will of Richard T. Chappell, deceased, and every part thereof is the will of Richard T. Chappell, deceased."

Whereupon the defendants in the issue moved the court to set aside the verdict of the jury and grant them a new trial upon the ground that the verdict of the jury was against the law and the evidence; but the court overruled the motion and refused to grant a new trial; to which ruling of the court the defendants, by counsel, excepted; and the court certified the evidence adduced at the trial.

On the trial of said issue, and after all the evidence had been introduced, the defendants in the issue moved the court to give to the jury two instructions, designated as instructions C and D, respectively, as follows:

Instruction C.

"That 'undue influence' is any means employed upon and with the testator by which, under the circumstances and conditions by which the testator was surrounded, he could not well resist, and which controlled his volition and induced him to do what otherwise would not have been done."

Opinion.

Instruction D.

“When an old man eighty-five years old, of greatly impaired health and enfeebled mind, away from his next of kin and in the custody of persons of no kin, is induced to make a will giving to such persons his entire estate, the law requires that such persons must clearly prove that the said will was the free and voluntary act of the testator and an intelligent expression of his wishes respecting the disposition of his property.”

But to the giving of these instructions the plaintiffs in the issue objected, and, by counsel, in lieu thereof, asked for two other instructions, marked, respectively, 6 and 7, which objection the court sustained and gave said instructions 6 and 7, as follows:

Instruction 6.

“The question as to what is undue influence such as to overcome the will or control the judgment of the testator, largely depends upon the circumstances of each case, chief of which are the dispositions contained in the will, the situation of the testator, and his mental and physical condition at the time the will was made.

“Influence to vitiate an act must amount to force and coercion, obstructing free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another that might be a very strong ground in support of the testamentary act.

“Further: there must be proof that the act was obtained by this coercion, by importunity that could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force or fear.

“On the other hand, where the provisions of the will accord with the affections and previous declarations of the testator, and are such as might have been justly expected, these are

Opinion.

facts tending to prove both testamentary capacity and freedom of action."

Instruction 7.

"When a testator of great age and impaired health by his will gives his property to persons who are immediately about him, to the exclusion of his kindred, it is the duty of the jury to look closely into the question whether such disposition was free and intelligent, to consider what previous declaration of his purpose (if any) he may have made, his relations and feelings towards his kindred and towards the beneficiaries under the alleged will, and to inquire whether, under all the circumstances of the case, the disposition made is such as might naturally have been expected, and such as the common sense of men would naturally expect.

"If, in such case, relations are disinherited who would naturally have been expected to be the objects of the testator's bounty, in favor of persons in whose favor, under the circumstances, such a disposition would not have been anticipated, they should very clearly show that the will was the free and voluntary act of the testator."

And thereupon the defendants in the issue offered in lieu of said instruction No. 6, given by the court, the following instruction, marked E:

Instruction E.

"The court instructs the jury that to make a good will a man must be a free agent, but all influences are not unlawful; appeals to the affections or ties of kindred, to gratitude for past services or pity for future destitution, or the like, are all legitimate, and may be fairly urged on a testator. On the other hand, pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment, is a spe-

Opinion.

cies of restraint under which no valid will can be made. Importance which the testator has not the will or strength to resist, and to which he yields for peace and quiet if carried to a degree in which the testator's judgment, discretion, or wish will constitute undue influence, though no force is used or threatened. In other words, his will must be the offspring of his own volition, and not the record of the wishes and desires of some one else, and in considering whether the testator's free volition had been overborne or controlled, the jury must consider his age, his physical and mental condition, and all the circumstances surrounding the testator."

But the court overruled the motion and refused to give said instruction E in lieu of said instruction 6, given at the instance of the plaintiffs in the issue; to which action of the court refusing instructions C, D, and E, and giving said instructions 6 and 7, the defendants in the issue, by their counsel, excepted; and the said rulings of the court with respect to said instructions constitute the subject of the defendants' bill of exceptions No. 1.

And further, upon the trial of the issue, and after all the evidence had been introduced, the defendants in the issue moved the court to give the following instruction, designated

Instruction No. 1.

"The court instructs the jury that no will is valid unless in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature, and moreover, unless it be wholly written by the testator, the signature must be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator."

But on the motion of the plaintiffs in the issue, by their

counsel, the court added to the instruction so asked for, the following :

“ If a will has been signed by some other person in the presence of the testator, and by his direction, it is not required that such direction be in any particular form. It may be by the spontaneous direction of the testator, or by the suggestion of a third person accepted and adopted by the testator.”

To this addition to the instruction, as asked for by them, the defendants in the issue objected, but the court overruled their objection and made the addition to the instruction as asked for by the plaintiffs in the issue; to which action of the court the defendants in the issue excepted; and this is the subject of their bill of exceptions No. 2.

As already stated, the jury returned a verdict sustaining the alleged will; and the defendants in the issue, by counsel, moved the court to set aside the verdict of the jury and grant them a new trial, upon the ground that the verdict was against the law and the evidence in the case; but the court overruled the motion and refused to grant a new trial, and thereupon proceeded to enter its decree in accordance with the finding of the jury; to which action of the court the defendants in the issue, by their counsel, also excepted, and the court certified, not the facts, but all the evidence; and this is the defendant's [in the issue] bill of exceptions No. 3. From the decree so rendered, the case is here on appeal.

The main question in the case is one of testamentary capacity. In other words, the question to be decided is, Was the alleged testator, Richard T. Chappell, at the time of the execution of the writing purporting to be his last will and testament, capable of making a valid will disposing of his property?

The statute, § 3, ch. 118, Code 1873, provides that “ no person of unsound mind or under the age of twenty-one years, shall be capable of making a will, except that minors eighteen years of age or upwards may, by will, dispose of personal

Opinion.

estate; nor shall a married woman be capable of making a will, except for the disposition of her separate estate, or in the exercise of a power of appointment." And as to the mode of executing wills, it is provided by section 4 of the same chapter, that "no will shall be valid unless it be in writing and signed by the testator, or by some other person in his presence or by his direction, in such manner as to make it manifest that the name is intended as a signature; and, moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

This case is so remarkably like the case of *Tucker v. Sand-
edge, Curator*, 85 Va. 546, that it may be said with safety to be, in every essential particular, ruled by that case; and, upon the important question of testamentary capacity, we cannot do better than to reproduce here the authorities cited in that case, as follows:

"In the *Marquis of Winchester Case* it is said that 'by law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions; but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason, and that is such a memory which the law calls sound and perfect memory.'

"In *Mountain v. Bennett*, 1 Cov., 353, the Lord Chief Baron said: 'Two things must be made out, in the first instance, by those who support the will—the formality of the instrument and the sanity of the person making it; that if a party impeaching a will relies upon actual force being used upon the testator, it is incumbent on him to show it,' and he adds that 'there is another ground which, though not so distinct as actual force nor so easy to be proved, yet if it should be made out would certainly destroy the will; that is, if a dominion

was acquired by any person over a mind of sufficient sanity to general purposes, and of sufficient soundness and discretion to regulate his affairs in general; yet, if such dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind.'

"In *Mursh v. Terrell*, 2 Hagg., 122, that experienced and learned judge, Sir John Nicholl, said: 'It is a great but not uncommon error to suppose that, because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect sound mind, and is capable of making a will for any purpose whatever; whereas, the rule of law, and it is the rule of common sense, is *far otherwise*; the competency of the mind is to be judged by the nature of the act to be done, from a consideration of all the circumstances of the case.'

"The observations of Erskine, J., in *Harwood v. Baker*, 3 Moore Priv. C. C., 282-290, * * * are worthy of note. He says: 'But their lordships are of opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is, by his will, giving the whole of his property to one object of his regard, but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property'; and he justly and truthfully adds, 'that the protection of the law is in no case more needed than it is in those where the mind has become too much entebled to comprehend more objects than one, and most especially when that object may be so forced upon the attention of the invalid as to shut out all others that might require consideration; and therefore the question which their lordships propose to decide in this case is not whether Mr. Baker knew when he was giving all his property to his wife and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were,

Opinion.

of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property.'

"In *Derr v. Jackson*, 2 Southard's R., 454, the chief justice, in charging the jury on this point, said, 'that a disposing mind and memory is a mind and memory which has the capacity of recollecting, discerning, and feeling the relations, connections, and obligations of family and blood; that, though it has sometimes been said, as had been stated from the books, that if one could tell his name, say the day of the week, or even ask for food, it is a sufficient evidence of a disposing mind; yet such sayings, though they show that wills are not rightly to be set aside on suggestions of incapacity, can and ought to have but little weight with rational men, investigating the truth upon their oaths; that if, upon the whole, they should be of opinion that the mental powers of the testatrix were so far enfeebled and broken as that she could not make a discreet disposition of her affairs herself, and the will in question was devised by other persons, and only assented to by her, upon being asked, without the power of understanding it, then they ought to find for the plaintiff; that is, that it was not her will.' * * *

"In *Shropshire v. Reno*, 5 J. J. Marsh., 91, Robertson, C. J., observed that the facts in that case led to the conclusion 'that the testator had not a disposing mind, or that if he ever had, it was not in a disposing state. He was not superannuated, nor was he absolutely *stultus* or *fatuus*; but all the facts combined tend to show that he had not a *sound memory*, was sufficient mind, nor a mind in a proper state for disposing of his estate with reason, or according to any fixed judgment or settled purpose of his own. This we consider the true test, established not only by philosophy, but by law.

"*Converse v. Converse*, 21 Verm. R., 168, lays down the rule, that if 'the testator, when he made the will, was capable of knowing and understanding the nature of the business he was then engaged in, and the elements of which the will was com-

posed, and the disposition of his property as therein provided for, both as to the property he meant to dispose of by his will and the persons to whom he meant to convey it, and the manner in which it was to be distributed between them, then he possessed a sound and disposing mind and memory.' This rule was approved by Redfield, J., who added: 'He must undoubtedly retain sufficient *active memory* to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them.'

"In 1828, Chancellor Walworth, in *Clarke v. Fisher*, 1 Paige, 171, said: 'The general principles in relation to the capacity of a person to make a will are well understood. He must be of sound and discerning mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment in reference to the situation and amount of such property, and to the relative claims of different persons who are or might be the objects of his bounty. In that case the chancellor reversed the decision of the surrogate, which admitted the will of John Fisher to probate. The testamentary capacity of John Fisher was again the subject of judicial investigation before Vice-Chancellor Sandford, in 1845 and 1846 (3 Sand. Ch. R., 351), and he held that he had testamentary capacity. But, on appeal, that decision was reversed by the chancellor, who held the will void, and the chancellor's decree was, on appeal, affirmed by the New York Court of Appeals.' 2 Cor. R., 498."

The cases above referred to were decided by courts of very high authority; and they state with clearness and accuracy the true principles to be applied in determining the question of testamentary capacity. And, as was said in *Tucker v. Sandridge*, *Curator*, 85 Va., 546, they do not attempt, on the one hand, the difficult, if not impossible, task of laying down any precise rule as to the exact amount of mental capacity essen-

Opinion.

tial to a valid will, and, on the other hand, they carefully avoid that other and perhaps more dangerous doctrine, which has sometimes been held, that any degree of mental capacity above that of the idiot and the lunatic is sufficient; but, appealing to unfettered human reason as the only safe guide to rational and just testatorial conclusions and actions, they do prescribe the only sensible, judicious, and safe rule for the guidance of the courts. They announce the simple, common-sense doctrine that, in order to execute a valid will, the alleged testator must be shown to have, at the time of making it, sufficient *active memory* to recall his family and his property, and to form some rational judgment in regard to the claims of the one and the disposition of the other, with reference to the claims of family and blood. In other words, as was said by Redfield, J., it must appear that the testator, when he made his will, "was capable of knowing and understanding the nature of the business he was then engaged in, and the elements of which the will was composed, and the disposition of his property, as therein provided for, both as to the property he meant to dispose of by his will, and the persons to whom he meant to convey it, and the manner in which it was to be distributed among them."

In the light of the principles above stated, the question is, Was the alleged testator, Richard T. Chappell, at the time of the execution of the paper in question, purporting to be his last will and testament, possessed of testamentary capacity to make a valid will?

Our statute of wills declares that "no person of unsound mind or under the age of twenty-one years shall be capable of making a will, except that minors eighteen years of age or upwards may, by will, dispose of personal estate; nor shall a married woman be capable of making a will, except for the disposition of her separate estate, or in the exercise of a power of appointment." Code 1887, § 2513. And as to the mode of executing a will, it is declared that "No will shall be valid

Opinion.

unless it be in writing and signed by the testator, or by some other person in his presence, and by his direction, in such manner as to make it manifest that the name is intended as a signature; and moreover, unless it be wholly written by the testator, the signature shall be made or the will acknowledged by him in the presence of at least two competent witnesses, present at the same time; and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." *Ib.*, § 2514.

Before proceeding to examine the testimony bearing directly on the question of testamentary capacity, it is important to call attention to the circumstances immediately preceding and attendant upon the execution of the paper in question, and to give a brief sketch of the life, habits, and character of the alleged testator, as disclosed by the record.

The will is very brief, and is shown to have been written with unbecoming haste and without any, or the opportunity of any, deliberate forethought, on the part of the alleged testator, and without any precaution on the part of either the draftsman of the paper or the attesting witnesses to ascertain whether, at the time, the alleged testator was possessed of sufficient mental capacity to make a valid will.

It unmistakably appears that Mr. Chappell was averse to making any will; that he, with one exception, presently to be mentioned, uniformly, for many years prior to the execution of the paper in question, when approached on the subject by his neighbors and friends, declared either that "the law makes the best will," or that "the law makes a good enough will for me." On the one occasion referred to, at the suggestion of Mr. Elam, an acquaintance and friend, he agreed to provide for his brother, the appellant, Josiah Chappell, for his life, and solicited Mr. Elam's aid in arranging the matter; but this agreement was never carried into effect.

Never, on any other occasion, did he say or do anything evincing any serious purpose on his part to make any will,

Opinion.

much less a will giving to Eliza and Ned Trent his entire estate, to the utter exclusion of his family and blood. Indeed, Mr. Elam testifies that he, on the occasion above mentioned, said to Mr. Chappell that he (Elam) had heard that he (Chappell) intended to give his estate to the Trents; and that Mr. Chappell indignantly denied the truth of the report, and booted at the idea of his giving the Trents anything.

The so-called will was wholly written, including the signature, by Dr. T. W. Nelson, the attending physician, and was attested by Charles H. Terrell and Joseph M. Crank, both of them brothers-in-law of the beneficiaries (Eliza and Ned Trent). The alleged will is as follows:

"I, Richard T. Chappell, being of sound mind but extremely feeble of body, do make and ordain this to be my last will and testament. I give to Eliza Mc. Trent and E. T. Trent, now living in my house, all the property of whatsoever kind I die possessed after the payment of my just debts.

"Given under my hand and seal this 17th day of June, 1890.

"R. T. CHAPPELL, [SEAL.]

"*By T. W. Nelson.*

"Witnessed by Charles H. Terrell and Joseph M. Crank."

Mr. Chappell died the owner of an estate estimated at near \$20,000 in value. He left surviving him, as his next of kin and heirs at law, a brother of the full blood, the appellant, Josiah Chappell, of Abingdon, Va., and the numerous descendants of two older half sisters, who, a great many years ago, married and moved South, and whose descendants are very much scattered.

Mr. Chappell died of an acute, painful, and rapidly exhausting attack of dysentery, after an illness of about three weeks, and was, at the time of his death, over eighty-five years of age. Up to within three hours before the execution of the paper in question, he never said or did anything that could be tortured

Opinion.

into evincing any purpose on his part to make any such will as that here in question, or any will whatever, except on the occasion referred to, when he agreed, at the instance of Mr. Elam, to make a life provision for his brother, the appellant, Josiah Chappell; and never, until the day of the execution of this pretended will, and within three hours before its execution, did he declare any purpose to make a will providing for the Trents in any way, and then only, according to the testimony of Ned Trent, one of the beneficiaries, to make *some provision* for said beneficiaries—not a will giving them his entire estate.

Ned Trent's statement is as follows :

Q. "Tell the jury what Mr. Chappell said when he requested you to send for Dr. Nelson."

A. "Went into room after dinner to keep the flies off him as usual after eating a meal, and he said to me five or ten minutes after—not longer than ten minutes after—that it was a very hard thing to be so low and know that you would never get well. I told him that it was, and we must all live in hope, and he paused, I supposed, for two or three minutes before he said anything more, and he asked me when would Dr. Nelson be back. I said late this evening or early in the morning. That is what he said. He said then that 'you and Eliza have been very kind to me all your lives and waited on me in sickness and in health, and I want to make some provision for you and Eliza, and wish that Dr. Nelson was here now.' Then I said, 'Do you want him sent for to fix it for you?' and he said, 'Yes, send for him now.' There was no one in the room except I and Mr. Chappell. I wrote a note to Dr. Nelson and sent it by one of the hands that worked on the place, Alfred Fowler. Dr. Nelson arrived, I suppose, in some hour and a half—not longer than two hours. I met Dr. Nelson in the yard and invited him into the house, and told him what Mr. Chappell had said to me. I then went into Mr. Chappell's room with Dr. Nelson. Mr. Chappell was asleep when Dr.

Opinion.

Nelson went into the room. He took a seat and waited ten or fifteen minutes—not longer than that—and Mr. Chappell awoke. Dr. Nelson asked him how he was, and he said ‘tolerably,’ as he always did, and asked the Doctor how he was. Then Dr. Nelson stood for a minute or so, and then said to him: ‘Mr. Chappell, I have come to do that writing I was sent for to do, and I am at your service to do anything that you wish.’ Mr. Chappell looked up at the Doctor, but did not give him any answer, and then the Doctor said to him: ‘Do you wish to make a deed by which you will give these people a part of your estate?’ He shook his head and said ‘No.’”

Q. “Did he simply shake his head, or say no?”

A. “He said no. Then he said, ‘do you wish to assign some of the certificates of deposit that you have,’ and he shook his head that time, and said no word.”

Q. “Did you hear any words?”

A. “No, sir.”

And then, says Ned Trent, Dr. Nelson said: “Shall I make a will and give these people your estate, and if it is God’s pleasure to restore you, you can amend or destroy or do anything you please with it, and Mr. Chappell said in distinct words, ‘That would be better’”; and upon this, and this only, Dr. Nelson sat down and wrote the paper in question as the last will and testament of Mr. Chappell, the whole scheme having originated in the mind of Dr. Nelson, and was, by him, suggested to this extremely aged, diseased, feeble, and dying man; and was thus, as the books say, more the will of Dr. Nelson than of Mr. Chappell. Now, conceding, as we may for the purposes of this case, the entire truthfulness of Ned Trent’s relation of the conversation between Mr. Chappell and himself immediately before Dr. Nelson was sent for, it must be admitted that the conversation, thus given in minute detail, indicated calmness and deliberation on Mr. Chappell’s part, and strongly tends to show that he was, at that time, possessed of sufficient mental capacity to enable him to make a valid will. But when we come

Opinion.

to look into what occurred after Dr. Nelson's arrival at Mr. Chappell's bedside, we find in Mr. Chappell quite a different man; we find him, evidently, entirely oblivious and unconscious of the fact that he had, less than two hours before, said to Ned Trent that he desired to make *some provision* for him and Eliza, and had directed Dr. Nelson to be sent for to *fix* the matter. There is no escape from the fact, and its consequences, that Mr. Chappell, on the arrival of Dr. Nelson, and throughout the time of writing and executing this pretended will, retained no active memory of the previous conversation, as related by Ned Trent, in which he directed Dr. Nelson to be sent for to do the necessary writing. For when Dr. Nelson had arrived, had exchanged the usual salutations, and said, "Mr. Chappell, I have come to do the writing I was sent for to do," &c., Mr. Chappell, instead of recognizing the fact that he had directed the Dr. to be sent for, and explaining his object in so doing, and directing Dr. Nelson what to do, simply looked up, as if in a state of wonder and amazement as to what Dr. Nelson meant, and made no answer whatever; and then Dr. Nelson said to Mr. Chappell, "Do you wish to make a deed giving Ned and Eliza Trent part of your estate," and Mr. Chappell said "No." This was quickly followed by Dr. Nelson asking, "Do you wish to assign some of the certificates of deposit that you have," to which Mr. Chappell responded by a shake of the head, but without uttering a word. Both of these suggestions being negatived, Dr. Nelson made the monstrous suggestion: "Shall *I* make a will and give these people your estate, and if it is God's pleasure to restore you you can amend or destroy or do anything you please with it," to which Mr. Chappell responded, "That would be better."

Such is the statement of Ned Trent, one of the beneficiaries—a statement materially different from that of Dr. Nelson on the same subject, as will be shown when we come to examine his testimony. But let it be conceded, for the sake of the argument, that at the time of the execution of the pretended

Opinion.

will, Mr. Chappell retained a feeble gleam of intellect, or was half conscious of what was then going on (and in the light of all the circumstances, no greater concession can reasonably be made), yet, according to Ned Trent's own statement, so far from there being anything to show that the paper in question was the offspring of the mind of a free and capable testator, the facts and circumstances conclusively show that the alleged testator, Richard T. Chappell, was but a passive instrument in the hands of Dr. Nelson, by whose urgent importunities this so-called will in favor of the Trents was procured.

Mr. Chappell lived and died a bachelor, having never been married, and was in some respects a very peculiar man. He was extremely reticent about his affairs and about those of his family, and in his dealings, though said to be strictly honest, was close and stingy to a degree approximating miserly meanness. He was born in Charlotte county, Va., and in early manhood moved to and took possession of his estate in Bedford county, on which he died, and which had been derived from his father. Not very long after taking possession of his estate, he had a difficulty with his overseer, a man named Oglesby, and beat him so severely with rocks that he was sued and had to pay \$3,000 damages. After this he seems to have abandoned his estate in Bedford, and returned to Charlotte county, the place of his birth, and where his brother Josiah and his mother lived, and thenceforth his career is outlined in the uncontradicted testimony of his brother Josiah as follows:

"After the death of our father, he [Richard] being that much [four years] older than I was, we both lived together with our mother until he became twenty-one; he went up then to Bedford to live on the plantation, and took possession of it, and whilst he was there he had a falling out with his overseer, Mr. Oglesby, and in falling out he some way or other beat him very severely—struck him with rocks, as I heard; but any way, he had to pay \$3,000 for it. He then left this county, and he came to Charlotte and rambled about day and night, calling

Opinion.

at different houses at all hours of the day and night, and he would make threats sometimes against my mother, and perhaps against others, and the people became uneasy for fear he would kill somebody; he showed so much temper that the magistrate had him taken up, and ordered him to be sent to the asylum, and his estate being sufficient, they concluded to send him to a private asylum in Philadelphia, and there he remained, I think, at least two years, if not longer; he managed by some means or other to get out of the asylum, and came home—walked home mainly; I do not suppose he had any money or means; he got home, and the people were in favor of his being sent back. I was a partner with a man in mercantile business by the name of Fuqua, and we agreed to take him in the store and see if we could not manage him and get people satisfied with him. He went and lived in the store, and stayed there two or three years, and it was not very long before people became satisfied that there was no danger, and they gave up all idea of sending him back. Fuqua failed, and after his failure my brother came to my house and lived, and stayed there for years. Before this time, however, he had taken his estate; he told me that he wanted me to attend to it and manage it for him; to go up and see how everything was going on. I did so, and continued to do so until he finally came to the conclusion to go up and attend to it himself.”

Then, after stating that during his brother's mental malady he was his committee, and, as such, made annual settlements, the witness (Josiah Chappell) proceeds to make this further statement: “That after his brother took his estate into his own hands, he went on managing, and finally he got this man Trent as overseer,” (meaning Edward Trent, Sr., the father of Edward and Eliza, the beneficiaries under the will in question). “I think he had some others before that, but it was not long before he got Trent overseer for him. I used to go up at least once a year, and stayed with him right smart—week or fortnight and a month sometimes—and the Trents at one time

Opinion.

sort of fell out with me for coming and staying so long, and he (meaning his brother) then fell out with them or told them that they had no right to interfere with us. I proposed to him then that if he chose it, I would attend to his business myself; that I had at that time to go into bankruptcy and be deprived of what I had; that I would attend to the business. No, he said, you are not able to undergo all the necessary fatigue and exposure to attend to the business as it ought to be; so I gave it out, and Trent continued to attend, and every once in a year, and sometimes oftener, I would go and see him and stay a week or fortnight; if I was away a year I would stay longer. I could see every time that the Trents were opposed to me coming; they disliked me having any intercourse with him; at any rate, they showed a great deal of prejudice towards me sometimes, not in language, but in their behavior towards me; so I became more neglectful in coming up. I found that I could not get along that way; they were complaining they had to furnish me with a bed and such as that to sleep in; he (meaning his brother) had no furniture in the house except an old sort of trunk; they had all the balance; consequently they furnished the bed and they complained. I thought from the fact that their friends and persons coming there and staying a good long while without complaint that it was prejudice from some cause or other."

Then these questions were asked the witness:

Q. "It has been stated here by Mr. Elam that Mrs. Trent said that the last time you were there you did not stay as long as you had expected to stay when you came, and that on the morning you left Mr. Chappell had directed that you should not be invited to breakfast."

A. "My brother did not tell me that; he denied everything of the kind; but they failed to invite me to breakfast and failed to give me water to wash my face and hands and a towel to wipe on; I thought it best to be going. I discovered be-

Opinion.

fore that that they were very much opposed to me staying, and that was the next thing to ordering me out." * * *

Q. "The question I want to know is, Did you have any reason to understand or suppose that your brother wanted you at that time to go?"

A. "No, sir, none; he did not show any disposition that way; the only disposition shown to me to go was by the Trents."

Q. "Did you see your brother and tell him you were going?"

A. "Yes, sir; he was willing for me to stay; after that I very seldom offered to go and see him; I was not able to go; I had not the money to pay my expenses nor horse hire." * *

Q. "What assistance did you give, if any, in working upon the place whilst you were living or staying at your brother's place when there on a visit?"

A. "I mauled rails, cut down trees, worked in the corn-field, and split wood for the Trents to cook with; sometimes I sawed it, too; attended to the stock, cows, and things of that sort, working on different parts of the farm, and putting up fences."

This last statement is not only not contradicted, but is fully corroborated by the testimony of other witnesses.

Soon after the late war, Mr. Chappell employed as his overseer Edward Trent, Sr., who had a wife and several children; and of these Eliza and Ned Trent were two, the latter having been born on Mr. Chappell's plantation, after his father, Edward Trent, Sr., became Mr. Chappell's overseer. Edward Trent, Sr., or his wife, had furniture; Mr. Chappell had none except, as one witness says, a pair of old tongs, and, as another witness says, some old andirons. The agreement between Mr. Chappell and Edward Trent, Sr., was that Mr. Chappell should be at all the expense of cultivating the farm, and should furnish bread, meat, and milk for the table; and Mr. Trent was

Opinion.

to furnish everything else for the table, such as coffee, sugar, &c.; was to work on and oversee the plantation, was to furnish the house, including Mr. Chappell's room; was to occupy the house with Mr. Chappell, and was to receive one-fourth of the crops in kind.

This agreement remained in force until Mr. Trent's death, which occurred some six or seven years prior to the death of Mr. Chappell, and Mrs. Trent, with her family, continued to live in Mr. Chappell's house with him until some three years prior to his death, when she died, leaving Ned and Eliza, the beneficiaries under the will in question, still living there. Ned Trent, on the death of his father, succeeded to the contract of his father, and the same was continued until Mr. Chappell's death, Eliza Trent, in the mean time, doing the cooking and performing the household duties which devolved upon her after her mother's death.

Such being the true relations, and the only relations existing between Mr. Chappell and the Trents, we come now to consider the testimony of the witnesses who were present at the crucial period of time when the paper in question was prepared and executed. These witnesses are Dr. T. W. Nelson, who wrote the paper, and Charles H. Terrall and Joseph M. Crank, the attesting witnesses, and both of them brothers-in-law of the beneficiaries. Obviously, the question being one of testamentary capacity, the case must turn mainly upon the evidence of Dr. Nelson, who was the attending physician, was present and wrote the will, and who had been the intimate friend and physician of Mr. Chappell for thirty years.

The testimony of these witnesses will be examined in the order in which they were introduced, and first as to Mr. Crank. After having the will shown to him, and saying it was the paper attested by him as the will of Mr. Chappell; that it was written and signed by Dr. Nelson for Mr. Chappell; that Mr. Terrell, the other subscribing witness, was also present at the same time and attested the will, and that they and Dr. Nelson

Opinion.

were all present at the same time, Mr. Crank was examined and testified as follows:

Q. "I wish you would tell the jury just what occurred in Mr. Chappell's room on the execution of this paper?"

A. "Dr. Nelson came in and spoke to Mr. Chappell and asked him how he was, and he said, 'How are you, doctor?' and Dr. Nelson says to Mr. Chappell, 'I came to do that writing that I was sent for to do,' and asked him what he wanted wrote. He said, 'I want to do something for these people.'"

Q. "Nelson said he had come to do that writing that he was sent for to do?"

A. "Yes, sir."

Q. "What do you say Mr. Chappell said?"

A. "Mr. Chappell said, 'I want to do something for these people—that is, Ned and Eliza.' Dr. Nelson said, 'Do you wish me to make a deed?' Mr. Chappell shook his head; he did not say anything; if he did, I did not hear it. Dr. Nelson says, 'Do you wish me to assign one of those certificates of deposit to them?' and he said, 'No'; he shook his head and said 'No.' I heard it, and Dr. Nelson says, "Do you wish to give them your estate?" and Mr. Chappell said, 'That would be better,' and Dr. Nelson said, 'Shall I write a will and give them your estate?' He says, 'That would be better.' Dr. Nelson said, 'Shall I write it?' and he nodded his head; if he said anything, I did not hear it; he might have said 'yes,' but I did not hear it. Dr. Nelson then wrote what is on that paper." Then the witness stated that he left the room and went into the yard near by while Dr. Nelson was writing the will; that Terrell and Eliza Trent were out in the yard with him; that he was out in the yard fifteen or twenty minutes, possibly, and was called back into Mr. Chappell's room by Ned Trent; and then he was asked this question:

Q. "Tell the jury what transpired when you went back?"

A. "I went back, and Dr. Nelson had written the will that

Opinion.

you see here, and he handed it to Mr. Chappell, and he had it in his hands as though he was reading it; he looked as if he was reading it. I don't know whether he read it or not. Dr. Nelson says, 'On account of your feebleness, Mr. Chappell, shall I sign your name for you in the presence of these two gentlemen?' [myself and Mr. Terrell], and he nodded his head."

Q. "Did you hear him say yes or no?"

A. "I did not."

Q. "Was anything said by Mr. Chappell, by Dr. Nelson, or any one else, as to what was contained in the paper—what the will was?"

A. "He told him, 'Providing it was God's providence, he could dispose of the will and make any change in it, provided it was the providence of God that he should get well.'"

Q. "Now go on and tell what occurred?"

A. "As I told you, Dr. Nelson signed the will for Mr. Chappell, by his consent, in the presence of Mr. Terrell and myself. Mr. Terrell had signed it, and I signed it as *contesting* witnesses. What else passed I do not have remembrance of."

Yet this witness, in his further examination, seems to have known and disclosed a great deal more. He proceeds in answer to questions, to say that Dr. Nelson, after writing the will, and after witness returned to Mr. Chappell's room, told Mr. Chappell that he was giving his property to Eliza and Ned; that by this paper "he gave his whole estate to Ned and Eliza Trent"; that Dr. Nelson asked if witness and Terrell should attest the paper, and Mr. Chappell nodded his head as "Yes"; that witness did not hear him say yes, but he nodded his head. "He knew who we was." And when questioned as to Mr. Chappell's mental condition, this witness answered, "He knew what he was doing." Yet it is admitted that Mr. Chappell did not utter a word to either of the attesting witnesses, nor either of them to him during the execution of this paper; that witness, on the day of its execution, was at Mr. Chappell's assisting in

Opinion.

waiting on him ; that he got there that morning about 9 o'clock, and he says that, on going into the sick room, Mr. Chappell, on being spoken to by witness, asked after Neely, the witness' wife, who, the witness says, Mr. Chappell knew to be sick, that witness told him she was better, and that Mr. Chappell said, "I am mighty glad to hear it ;" that witness, before the day in question, had not seen Mr. Chappell since the preceding Sunday ; and that, after the execution of the paper, witness went home and did not see Mr. Chappell any more during the remaining four days of his life. And the only reason given by this witness (Crank) for saying that Mr. Chappell knew what he was doing, is, that, when Dr. Nelson was talking to Mr. Chappell about the will, the latter looked up and asked Dr. Nelson, "By what way are you to be benefitted," and that Dr. Nelson said he was not to be ; "you always paid me what you owed me, but I think you are under some obligations to these people." The last question asked Mr. Crank on his examination-in-chief was this :

Q. "When this will was signed for him, [Mr. Chappell], and attested by you and Mr. Terrell, what was the relative positions of Mr. Chappell and yourself when you signed it?"

A. "He was sitting in bed with the pillows behind him in this position, [knees drawn up and his arms clasped around them]. He was looking at us just as I am looking at you now ; we were set right in front of him, and we both wrote our names on an atlas lying on the bed."

The attesting witnesses seem to have learned the importance of being in the line of vision of the so-called testator, so they were *placed* at the foot of the bed, squarely in front of this extremely aged, diseased, wasted, suffering and dying old man, who was propped up in bed, his legs drawn up, and his hands clasped round his knees, and, as is proven by Dr. Nelson, his intimate friend and physician, was, to say the least, in a condition of stupor, or at most, in a state of half consciousness. No wonder that, when these attesting witnesses were called

Opinion.

into the presence of this truly touching death-bed scene, and to perform the solemn duty of attesting his will, Mr. Chappell failed to recognize either of them, or by any intelligible word or act, to evince the least consciousness of their presence. But, in the light of all the circumstances, it is amazing that neither of the attesting witnesses, the neighbors and professed friends of Mr. Chappell, men called by the law to the bedside of a dying man, and to ascertain whether his mental condition was such as to enable him to make a valid will, we say it is amazing that neither of them thought it necessary to ask him a single question, or to resort to any, even the least, means of ascertaining his mental condition. The simple fact that Mr. Chappell did not, on their entering his room, extend to them the ordinary signs of recognition, or say to them that he had had them called in to witness his will, was in itself more than enough to make them vigilant and prompt in extending to him that protection contemplated by law; more than enough, especially when they saw and heard what transpired between Dr. Nelson and the "semi-unconscious" and dying man, to make them recoil with abhorrence from any participation in setting up this paper as the true last will of a conscious and capable testator.

On his cross-examination, this witness [Crank], was asked these questions:

Q. "Where did you go on the Monday morning after old Mr. Chappell was buried?"

A. "Mr. Terrell's from my house."

Q. "Whom did you meet there?"

A. "Ned Trent; Eliza was there when I got there."

Q. "How came you to go there?"

A. "I went with Dr. Nelson."

Q. "How did you and Dr. Nelson happen to go there?"

A. "He came to my house; my wife was sick, and he said that Miss Eliza and Ned had gone to Mr. Terrell's, and wanted to see me on some business, and I went."

Opinion.

Q. "When you got there, where was Mr. Terrell?"

A. "At home."

Q. "Then, while you and Eliza and Ned Trent, Dr. Nelson and Mrs. Terrell were there all together, what was the business you met there for?"

A. "We met there to see what was best—what disposal we were to make of this will, and what steps we would take; what would they do about it, and about consulting a lawyer."

Q. "Were you not at that time doubtful as to whether the will amounted to anything or not?"

A. "I thought it was a good will; I do not think I had a doubt."

Q. "You were to consult a lawyer about it?"

A. "Yes, sir; go to Lynchburg the next day and consult a lawyer; that is all that was done, and nothing more said about it. It was agreed that we should come to your office [Major Kirkpatrick's], and we all did come the next day, except Eliza and Ned Trent."

Major Kirkpatrick then proceeded to further cross-examine the witness, as follows:

Q. "Now, I want to ask you this question; Was there not a doubt expressed in your presence and in my presence, in my office that day, as to whether the will was worth anything or not?"

A. "I did not make any expression whatever. I did not express myself in the matter at all."

Q. "You stood by and let the others express?"

A. "I was in there, and did none of the talking."

Now, Dr. Nelson wrote this pretended will, and, after the mockery of formal execution was gone through with, he handed it to Eliza Trent and told her to put it away, it having been sealed in an envelope by him. Why, then, if, as this witness says, he thought it was a good will, and does not think he had a doubt about it, did he join in this preconcerted, secret conclave at Mr. Terrell's, and there consult and determine what

Opinion.

was best—what disposal they should make of this paper, and what steps they should take? Why did Mr. Crank go with Mr. Terrell and Dr. Nelson to Lynchburg the next day (Tuesday) to consult a lawyer? Why all these things, if the will was thought by them to be a good and valid disposition of Mr. Chappell's property to the Trents, and to the exclusion of his family and blood? The irresistible inference is that the witness did, as well he might, have doubts—serious doubts, which, unaided by counsel, not only embarrassed, but overwhelmed him. And when Major Kirkpatrick, for the contestants, asked the witness the plain and direct question, "Was there not a doubt expressed in your presence and in my presence, in my office that day, as to whether the will was worth anything or not?" did the witness make the palpably evasive answer: "I did not make any expression whatever; I did not express myself in the matter at all"? And then when the further question was put to him, "You stood by and let the others express?" why did the witness again evade a direct answer, by saying, "I was in there, and did none of the talking"? Observe, the question was not as to whether the witness had expressed the doubt, but whether he had heard the doubt expressed, in Major Kirkpatrick's office, on the day named. And thus, notwithstanding the evident purpose of the witness to evade this very pertinent inquiry, the necessary inference is that he not only entertained the doubt himself, but that he heard it expressed in Major Kirkpatrick's office.

This witness had been previously asked how far he lived from Mr. Chappell, and he answered, "I lived nearly two miles from there." He was then asked to tell who lived within that two miles, nearer to Mr. Chappell than he did at the time of Mr. Chappell's death, and he answered "Mr. Daniel lived on the road about a mile; Mr. Oliver just a short distance—he lived in sight of Mr. Daniel on the same road; Mr. John Steptoe, he does not live immediately on the road, but in sight of the road, a mile and a quarter from Mr. Chappell's." He was then

Opinion.

asked this question, "Is Mr. Steptoe a man of position in that community," and he answered, "He is postmaster and a magistrate." He was then asked, "Who else lives not over a mile," and he answered, "Mr. William Oglesby and Dibrell Oglesby; then Mr. Fergons and Mr. Webber about a mile and a half or two, perhaps; then Mr. Nelson Hawkins and Dr. Nelson not over a mile and a half or two miles." And the witness was then asked, "Are those people you have mentioned any kin to the Trents," and he answered, "No, sir." The people thus named seem to have constituted the neighbors of Mr. Chappell for two miles round, none of them akin to him, and several of them almost within call; and yet, of all of them, Dr. Nelson alone was called to the bedside of this "extremely feeble" and dying man; and most opportunely Mr. Crank and Mr. Terrell, brothers-in-law of the beneficiaries, were present to act the part of attesting witnesses. Why were not some of these numerous neighbors, so near by, and none of them kin of Mr. Chappell, or in any way liable to improper bias one way or the other? Why were not some two of them called as witnesses to the solemn act in question, instead of leaving Mr. Chappell in the hands of Dr. Nelson, the avowed advocate of the Trents, the beneficiaries themselves, and their two brothers-in-law, Crank and Terrell? It is unnatural and unreasonable to suppose that these brothers-in-law did not feel a strong interest in favor of their brother-in-law and sister-in-law, the beneficiaries; an interest such as was well calculated to becloud and give undue bias to their judgment in respect to the testamentary capacity of Mr. Chappell. In view of all the circumstances, as disclosed by the testimony of the subscribing witnesses, of the beneficiaries, and of Dr. Nelson, the failure to call in two or more of the disinterested neighbors, can only be accounted for upon one of two grounds—first, that Ned Trent, when he sent for Dr. Nelson, was impressed with the fact that Mr. Chappell was so far gone that his death was imminent; or, second, that the disinterested neighbors were not

Opinion.

wanted. If it be not true that Ned Trent thought Mr. Chappell's death was very near at hand, why did he send in such instant and extreme haste for Dr. Nelson? Why, too, did he say to the messenger, if Dr. Nelson wants you to go anywhere else "*don't spare the horse.*"

We come now to the other subscribing witness, C. H. Terrell. His testimony may be much more briefly reviewed, inasmuch as he did not see Mr. Chappell, on the day of the execution of the paper in question, until he was called into the sick room to witness its execution. He knows nothing of Mr. Chappell's mental or physical condition at any previous time during that day, nor anything of the alleged conversation between Mr. Chappell and Ned Trent just before Dr. Nelson was sent for, nor anything of what transpired after Dr. Nelson arrived and before the alleged will was written. He was cognizant only of what transpired at the time of execution, and, as to this, he follows in the main in the footsteps of Mr. Crank, his predecessor.

It seems to have been felt to be necessary to account for the opportune presence of this other brother-in-law and subscribing witness. He says that his presence there on that occasion was *accidental*. It will be seen, however, from his own testimony, that he was there solely on account of his solicitude upon the subject of Mr. Chappell's will. In his examination in chief, by the propounders, he was examined, as to how he happened to be there, as follows:

Q. "How did you happen to be at Mr. Chappell's on the 17th of June, the date of this will?"

A. "My being there was accidental; I was passing near Mr. Chappell's, or had started to pass near Mr. Chappell's, and I met Albert Fowler, one of the hands, and I asked how Mr. Chappell was, and he said, 'He is easy now, I believe, but I was sent after Dr. Nelson,' and I asked him what for, and he said he did not know; I asked him if the doctor was at the

Opinion.

house, and he said 'Yes,' and I decided to go and ask him, and when I got to the house with him"—

Q. (Interrupting) "Where is your house and your farm in reference to Mr. Chappell's?"

A. "I am on the Lexington road and I rent part of his farm, and I pass his house to my land that I rent from him."

On his cross-examination, Mr. Terrell's attention was sharply called to the question as to how he happened to be at Mr. Chappell's on the day of the execution of this will, he having been suddenly led away from the subject by the interruption above noted, and he was cross-examined as follows:

Q. "I understand you to say that your being there on that occasion was purely accidental?"

A. "Yes, sir."

Q. "Had nothing to do with making the will?"

A. "No, sir."

Q. "And did not know anything in regard to it until after you had gone to the house?"

A. "Nothing definite. I suspected, after meeting Alfred Fowler; he told me Mr. Chappell was easy, but he had sent for Dr. Nelson, but he did not know what for; but I did not know anything before I reached the yard."

Q. "Why did you suspect he was sent for to make a will?"

A. "From Alfred's answer. I thought it quite likely that Mr. Chappell would make a provision for these people."

Q. "You had never heard anything of his making provision for them until you reached the yard?"

A. "No, sir."

Q. "But you suspected as soon as you heard that Dr. Nelson had been sent for on this occasion that he was there for the purpose of making a will?"

A. "Yes, sir."

Q. "Is that your only reason for suspecting?"

A. "No, sir; the only reason for suspecting it at that time;

Opinion.

but I was not surprised at hearing that Mr. Chappell was making a will in their favor at any time."

Q. "Why did you suspect that he was there on this occasion for that purpose?"

A. "From the answer that Alfred gave me."

Q. "Was not this matter talked about between you and them before that?"

A. "No, sir."

Q. "Never been mentioned at all?"

A. "About this time it had not, but what Mr. Chappell said to me coming from Mr. Weber's, was that he was going to make provision, but did not say at what time."

Q. "When was that?"

A. "More than a year before Mr. Chappell died."

Q. "He had told you that he had told Mr. Trent that Mrs. Trent should not want for anything?"

A. "Yes, sir. I did not intend to say that Mr. Chappell had told me; I had not heard him make this promise to Mr. Trent; he told me that he had."

Q. "He told you that he had told Mr. Trent on his death-bed that Mrs. Trent and — should not want for anything?"

A. "Yes, sir."

Q. "And this he told you about a year before he died?"

A. "That was more than a year before he died; that was several years ago. It was about the time of Mr. Trent's death that he told me—I reckon about six years ago."

Q. "And that conversation and the one that he had about Ned's going to live in Lynchburg was all the reason you had for that?"

A. "No, sir; from his *general* disposition and kindness to them in many respects I was not surprised at all at his making a will in their favor."

Q. "You had never heard him say that he would make a will in their favor?"

A. "No, sir."

Opinion.

Q. "Did you ever hear him say that he intended to make a will in favor of anybody?"

A. "Never did."

Q. "Did you ever hear him express himself about making a will of any sort—good, bad or indifferent?"

A. "No, sir, not in plain words that he intended or did not intend to make a will."

Now all this, in connection with other parts of Mr. Terrell's testimony, establishes—1st, That on the day the so-called will was executed Mr. Terrell was passing the road near Mr. Chappell's, and did not deem it necessary to call at the house; but meeting with Albert Fowler, who had been after Dr. Nelson, and who said to Mr. Terrell he did not know for what the doctor had been sent for, he (Terrell) jumped to the conclusion—a strange one—that Dr. Nelson had been sent for to write Mr. Chappell's will, and that he (Terrell) went to the house solely by reason of his solicitude on the subject of Mr. Chappell's will. 2d. That about the time of Mr. Trent's death, Mr. Chappell had said to him that Mrs. Trent and Eliza should not suffer for anything, or need not suffer for anything—a very natural and proper remark, but one by no means evincing any purpose on Mr. Chappell's part to make any provision by will for any of the Trents. 3d. That Ned Trent, after his mother's death, had determined to quit Mr. Chappell's employment and go to Lynchburg to live, and that Mr. Chappell had conditionally employed another man to take Ned's place; that about this time Mr. Chappell, in a conversation, said to Mr. Terrell he was sorry Ned was going to leave; that it would be better for him not to go, and that it would be better for him to stay there. And Mr. Terrell says that he told Ned he had better be cautious about leaving, and that Ned did not leave. The absurdity of all this will appear when we come to examine other testimony introduced to show that this and similar unimportant facts are relied upon as previous declarations by Mr. Chappell of a purpose to make a will in favor of

Opinion.

the Trents; that is, in favor of his overseer and the sister of his overseer, to the utter exclusion of his own blood kin and heirs-at-law. This little episode about Ned's purpose to go to Lynchburg to live, proves, if anything, far too much for the purposes of the supporters of this will; it proves that however much of scheming there was by others in favor of the Trents, (and there was much of it), Mr. Chappell had never in any way impressed Ned Trent with the hope of being to any extent whatever the object of his bounty; for surely Ned Trent, though only some eighteen years of age, would not, had he entertained any such hope, have once thought seriously of surrendering so bright a prospect by leaving Mr. Chappell and going to Lynchburg. Moreover, nothing could be more natural, thoughtful, or just than for Mr. Chappell, a man of age and experience, to say of a raw and inexperienced boy like Ned Trent, that he was sorry that Ned was going away, and that it would be better for him to stay where he was; or, in other words, that he was doing well where he was, and that it would be better to continue on than go to Lynchburg and be exposed to the temptations incident to a strange boy's life in a city, without the wholesome restraints and protection of watchful parents and friends.

In some, not unimportant, respects there are discrepancies between the statements of Mr. Terrell and those of Mr. Crank, but it is not necessary to pursue them in detail. In most respects he follows the line of thought and even the very language of Mr. Crank with remarkable precision. For instance, when questioned as to Mr. Chappell's mental capacity at the time of the execution of the paper in question, he says: "He knew what he was doing," the exact words used by Mr. Crank in answer to the same question; and yet Mr. Terrell did not see Mr. Chappell on that day until he was called into the sick room to become one of the attesting witnesses, and then the usual salutations were not passed, nor was a word uttered by Mr. Chappell to either of them or by either of them,

Opinion.

nor does it in any way appear that Mr. Chappell was really conscious of their presence. Mr. Terrell, like Mr. Crank, seems to have been well up on the requisite relative positions of testator and attesting witnesses, and describes his position, at the time of attestation, as at the foot of Mr. Chappell's bed and right in front of him.

Taking the testimony of the two subscribing witnesses together, and weighing it in the light of the circumstances disclosed by them and in the light of other evidence on behalf of proponents and in the light of all the surrounding circumstances, the unavoidable conclusion is, either that the judgment and discretion of these subscribing witness was beclouded by their very natural partiality to their brother-in-law and sister-in-law, the beneficiaries under this instrument, or that they were ignorant of the duty imposed upon them by the law to test the mental capacity of the testator before certifying, as they do by their attestation, to his sanity and capacity to make a valid will.

In discussing the duties of both medical men and attesting witnesses on such occasions, it is said, in 1st Redfield on Wills, p. 96: "It would always be good ground of justification, if, at the request of the witness, the testator had been made to repeat substantially the leading provisions of his will from memory. If a dying or sick person (or any other one) cannot do this without prompting or suggestion, there is reason to believe that he has not a sane and disposing mind." And the author adds: "The language of *Walworth*, Chancellor, in *Scribner v. Crane*, 2 Paige, 147, 149, is well worthy of regard and remembrance: 'No person is justified in putting his name, as a subscribing witness to a will, unless he knows from the testator himself that he understands what he is doing. The witness should also be satisfied, from his own knowledge of the state of the testator's mental capacity, that he is of sound and disposing mind and memory. By placing his name to the instrument, the witness, in effect, certifies to his knowledge

Opinion.

of the mental capacity of the testator, and that the will was executed by him freely and understandingly, with a full knowledge of its contents.' ” And in a very elaborate and instructive note to the same page, in reference to the doctrine stated in the text, it is said :

“ We apprehend that what is here said in regard to the compromise of professional character, by becoming the witness to a will where the testator is not in a proper condition to execute it, will be somewhat unintelligible to the American mind. The impression in England is, both in the legal and medical profession, that one is bound to give directions on such occasions in regard to what the testator is competent to do, and that the medical attendant is responsible that he do not countenance the act of attempting to execute a will after the patient is incompetent to comprehend its import ; that by consenting to become a witness of the act he virtually certifies that the testator is of sound, disposing mind and memory ; that if such proves not to have been the fact, the character of the medical witness is seriously compromised, inasmuch as he is subjected to one or the other of the alternatives resulting from the dilemma in which he is thus placed, either that he was incompetent to detect such incapacity, or else that, knowing of its existence, he voluntarily connived at the creation of an instrument of great importance and solemnity while the supposed actor was in a state of mental unsoundness which incapacitated him for its valid execution. Under such circumstances the connivance may, with some show of reason, be regarded as implicating the medical witness in a virtual fraud upon the legal disposition of the property which would otherwise follow, since the attempt to execute a will, at such a time, is getting up the shadow of a legal instrument, the effect of which will be, if successfully carried through, to defeat legal rights which have already practically taken effect and become vested, when the simulated agent no longer possesses the capacity for voluntary action. It has always seemed to us there was great

Opinion.

justice and propriety in the English view of the subject. We think any gentleman, whether professional or not, would feel a delicacy and hesitation in regard to becoming a witness to such a transaction." And having thus vindicated the English view as preferable to the lax notion prevailing, to some extent, in this country, the author proceeds: "But with us the public opinion, which is the sovereign arbiter of duty, assumes sometimes to override the dogmas of written law. It is thus, no doubt, that it has come to be understood here, by some at least, that the witnesses to a will are not to be regarded as having expressed any opinion in regard to the sanity of the testator. It seems to be supposed that they are only witnesses to the act of signing. But when it is considered that the witnesses to a will must certify to the capacity of the testator, as well as to the act of execution, the transaction begins to assume a somewhat different aspect. One who puts his name as a witness to the execution of a will, while he was conscious that the testator was not in possession of his mental faculties, places himself very much in the same attitude as if he had subscribed, as a witness, to a will which he knew to be a forgery, which every honest man could only regard as becoming accessory to the crime by which the will was fabricated; so that it is not improbable that the want of proper appreciation of the discredit resulting from the act of becoming a witness to the execution of a will, by one confessedly incompetent to the proper understanding of the instrument, may, and probably does, result chiefly, with us, from the general misapprehension of the law upon the subject, rather than from any settled disposition to disregard its dictates if correctly understood."

This last remark we think peculiarly applicable to the subscribing witnesses in the present case. Their legal competency as attesting witnesses cannot be denied, but they were called upon and acted in great haste, and without sufficient opportunity for that calm reflection and deliberation so essential to an

Opinion.

act of such importance and solemnity, and, doubtless, were ignorant of the duty imposed upon them by law to test the mental capacity of the testator, and to know from *him* that he knew what he was about. This they neglected to do; and, although they say they were placed directly in front of him, and that he was looking at them, to use the language of the witnesses, "just as I am looking at you now," this is not enough; the all important thing was wanting, the actual personal knowledge of the attesting witnesses, gathered from the testator himself, that he was, at the time of the execution of the instrument, possessed of a sane, disposing mind and memory. That the testator in the present case did not possess such a mind and memory is too plain to admit of any reasonable doubt a proposition supported by the testimony of the subscribing witnesses themselves, and this notwithstanding their declaration that the testator "knew what he was doing." The result is that the subscribing witnesses fail to prove that Mr. Chappell was, at the time of the execution of the paper in question, possessed of a sane, disposing mind and memory, and that, therefore, said paper is not his true last will and testament.

We come now to the testimony of Dr. T. W. Nelson, the attending physician, who had been Mr. Chappell's intimate friend and physician for thirty years. He had known Mr. Chappell much longer and better than either of the attesting witnesses, and was greatly more competent to judge of Mr. Chappell's mental condition than any witness who testified for the propounders, and upon his testimony alone, it will be seen, the case is clearly with the contestants, the appellants here.

Dr. Nelson twice testified in regard to the execution of this paper—once when it was offered, *ex parte*, for probate in the county court, and again on the trial of the issue in this suit. In his statement before the county court, when asked whether Mr. Chappell was competent, at the time of the execution of this paper, to make a will, Dr. Nelson replied: "I am in doubt

Opinion.

about it. I would rather state the circumstances. He made the will at my suggestion. I am not thoroughly satisfied what constitutes competency. I said, 'Mr. Chappell, I understand you wish to give the Trents some portion of your estate.' He was sitting up in bed, with his hands locked in front of his knees. He opened his eyes, showing he comprehended my statement to him. I then said, 'Do you wish (knowing he had some certificates of deposit) to give them one of these certificates of deposit?' He said, 'I think not.' I then made this explanation to Mr. Chappell: I said, 'If you will make a will and give them your estate, you can, in the event of your recovery, amend or destroy this will.' His remark was, 'That would be better.' I then sat down and wrote the will as it is. Three or four times I distinctly told him what was the purport of this will. I did not read it to him. I said, 'This will gives your whole estate to the Trents.' After taking the will in his hands (he had *paralysis agitans* then and for years before), I knew he could not sign the will. I said, 'You are too feeble to sign your name.' (This was in the presence of the attesting witnesses.) 'Shall I sign it for you?' He said, 'Yes,' *with a nod*. I then signed his name in the presence of these witnesses. I remember this much distinctly. I am satisfied he thoroughly comprehended what I said to him. I was fully so impressed at the time."

In his statement made at the trial of the issue, Dr. Nelson differs, in certain not unimportant particulars, from his statement before the county court. His statement on the trial of the issue is as follows:

"Alfred Fowler, an employee of Mr. Chappell's, came to me on Tuesday, between 2 and 2½ o'clock, the 17th of June, and brought me a note from Mr. Trent, asking me to go over to Mr. Chappell's. I went to Mr. Chappell's after the receipt of the note. I rode up and tied my horse, as I always did, and got down and went into the room. On entering the room, Mr. Chappell was asleep. I suppose I had been in the room

Opinion.

but a very short time before Mr. Chappell roused up, and when aroused up I went to the bed and asked Mr. Chappell how he was. He looked at me, and I forget his remark—‘about as he had been,’ that was the amount of it; and he asked me how I was, and after some remark or two in regard to myself, I said to him that I had come over to see him in regard to doing something for the Trents, or giving the Trents something, I do not know which of these phrases I used, and *I do not think he made any reply to it.* I then said: ‘What is it you wish to do? Do you wish to make a deed to some portion of your estate (making a short pause), or do you wish to give them one of these certificates?’ He distinctly said to me, after making some delay, not very long, however, ‘I think not.’ I then said to him: ‘Mr. Chappell, if you prefer to do so, you can make a will, and in the event of your recovery, you can amend or cancel this will.’ He said (nodding his head up and down), ‘I think that would be better.’ I asked him some questions about it—I am not positive—the amount of it was, what portion of his estate should I give them; that is the idea I wished to ascertain. ‘Shall I make a will and give them your estate?’ He nodded assent. I remember he did not say yes or anything. He made this motion [nodding his head]. I sat down and wrote that paper you see there. During my writing of the paper there was no conversation with him. Whenever I looked at him he was aroused. After the will was written as you have it, I went to Mr. Chappell and said: ‘I have written this your will, which gives Miss Eliza and Ned Trent your entire estate,’ which I repeated as often as twice, and think probably three times, speaking right distinctly each time, fully as loud as I am talking now, and he nodded assent. I do not remember positively whether he spoke or not. When I proposed to write this will he did speak as well as give the nod, which was somewhat his habit, like all sick people. I then said to him: ‘As you are too feeble and tremulous to sign your name, shall I sign it for

Opinion.

you?' He gave consent, as I remember it now, in a hoarse whisper. I took some prescription blanks out of my pocket, and, the pen and ink being already provided, signed his name as you see it there. No, I told him before signing it (I transpose a little here), 'it is necessary that witnesses should see me sign your name and hear you give your consent to my doing so,' and casting about, I said, 'How would Terrell and Crank do?' And he gave consent to it, and I had them called in, or called them in myself (I think I stepped to the door and called them myself), and in their presence repeated the question. I signed his name, and they took the will to the foot of the bed, and he (Crank) rested the paper on the foot of the bed on which Mr. Chappell was lying and signed, and also Terrell, at the foot of the bed, signed his name."

When these two statements of Dr. Nelson are compared, it at once appears that they are materially different; and it is not necessary to trace these differences in detail, except in two particulars: 1st. In his statement before the county court Dr. Nelson says: "I said, 'Mr. Chappell, I understand you wish to give the Trents some portion of your estate.' He was sitting in bed, with his hands locked in front of his knees. He opened his eyes, showing he comprehended my statement to him." This statement, if anything, shows that, on Dr. Nelson's arrival, Mr. Chappell was not asleep, but sitting up (propped up) in bed, with his eyes closed, and that Dr. Nelson at once broached the subject or object of his visit by the remark, "Mr. Chappell, I understand you wish to give the Trents some portion of your estate," &c. But, in his statement on the trial of the issue, Dr. Nelson says that on entering the room he found Mr. Chappell asleep; that he waited but a very short time, and Mr. Chappell roused up; that he then went to the bed and asked him how he was; that Mr. Chappell said, "About as he had been," and asked me how I was; and after some remark or two in regard to myself, I said to him that I had come over to see him in regard to doing something for the Trents, or

Opinion.

giving the Trents something; *I don't* know which of those phrases I used." And thus it appears by the one statement that Mr. Chappell was not asleep, but was sitting up in bed, with his eyes closed, and that when Dr. Nelson said, "I understand you wish to give the Trents some portion of your estate," he (Mr. Chappell) opened his eyes, showing he comprehended the remark of Dr. Nelson; and by the other, that Mr. Chappell was asleep, and in a short time woke up, when Dr. Nelson, after considerable conversation, made known the object of his visit in different language and of different import, to which Mr. Chappell made no reply whatever. And in the statement on the trial of the issue Dr. Nelson entirely omits the words, "he opened his eyes, showing he comprehended my statement to him"; and well might he omit them, for nothing could be more absurd and ridiculous than to say that Mr. Chappell comprehended Dr. Nelson's statement because he opened his eyes. The most stupid animal that walks the earth would have done the same thing.

But taking Dr. Nelson's two statements together, it will be seen that the pretended will was made wholly at his suggestion; that when he first approached Mr. Chappell on the subject and stated the object of his visit, he received no reply whatever; that he in quick succession suggested that Mr. Chappell make a deed giving the Trents a portion of his estate, to which suggestion also he received no reply; that then, and almost without a pause, he suggested that Mr. Chappell give them one of his certificates of deposit, when, for the first time, Mr. Chappell made a verbal response, and said, "I think not." Then, with hot haste, the matter of the will was pressed upon Mr. Chappell, and he was argued with and urged to make a will giving his estate to the Trents, the argument being enforced by the suggestion that, in the event of his recovery, he could change or cancel the will at his pleasure; in reply to which Mr. Chappell said, "That would be better." And upon this, and this only, Dr. Nelson sat down and wrote the will

Opinion.

giving Mr. Chappell's entire estate to the Trents; and this under circumstances clearly showing that, to say the least, Mr. Chappell was so enfeebled by age, disease, and suffering as to be too weak to resist the urgent importunities pressed upon him by Dr. Nelson—circumstances so clearly evincing a want of testamentary capacity as to constrain Dr. Nelson himself to state, under oath, at the trial of the issue, that he doubted Mr. Chappell's capacity to make a will.

In a searching examination-in-chief and cross-examination, it was sought on the one hand to wipe out this doubt entertained by Dr. Nelson, and on the other, to have it explained and solved upon just principles. A brief review of the evidence, thus far, of Dr. Nelson, will show a strange state of things. In one statement, in his examination-in-chief, he says that whenever he looked, during the writing of the will, at Mr. Chappell, he was awake; and in another, in answer to the question, "What is your opinion as to whether he understood," [meaning the suggestions made to him], he answered: "Mr. Chappell closed his eyes as if asleep, momentarily, once or twice during the preparation of the will, on my saying to him what the contents of the will were, but when I called to him or said to him about as loud as I am speaking now, he was certainly conscious." This means, if anything, that when Dr. Nelson was going through the formal mockery of stating the contents of the will, Mr. Chappell was either asleep or was in a state of stupor, but that, when called to in a loud voice, he was conscious. But conscious of what? Simply that he had heard a loud voice, which temporarily aroused him; but not, in the light of the evidence and the surrounding circumstances, that he intelligently comprehended what was going on; for that, in the light of the evidence, was impossible.

But being further pressed by counsel in support of the will, and asked to state whether, in his opinion, Mr. Chappell understood that he was making a will giving his estate to Ned and Eliza Trent, Dr. Nelson answered: "The line of demonstra-

Opinion.

tion between when a man is—there is some doubt in my mind as to this—I would rather make a full and honest statement of the facts, and that is this: There was an entire absence of spontaneity in regard to this matter, but acting upon the honest impression that Mr. Chappell, as I believed then, and now believe, wished to do something for these people, who were the beneficiaries of the will, I made a suggestion mildly and respectfully, and in obedience to my suggestion, in every particular, he made that will.”

Dr. Nelson was then asked, “Did he understand your suggestions?” and he responded, “I am impressed that he did. It was my honest impression then, and, on subsequent reflection, it is now, that he understood the suggestions I made, and acted on them.” Counsel for the proponents again asked Dr. Nelson: “At the time you signed Mr. Chappell’s name to this paper for his will, were you then, and are you now, of the opinion that he understood what he was doing?” and the answer was: “He unmistakably gave his assent to my action in the matter.” They then propounded to him the very suggestive question: “You are satisfied, then, that he did know that he made his will giving the property to Ned and Eliza Trent?” and the answer was: “I am sure that he did.” And yet it clearly appears from the cross-examination of Dr. Nelson, now to be reviewed, that, notwithstanding his answer, indicating the utmost caution and reserve touching his impressions—his honest impressions, etc.—he, in fact, was far from believing that Mr. Chappell *sufficiently* understood, at the time, what was then being done to make the execution of this paper his free, voluntary, and intelligent act. On cross-examination Dr. Nelson was asked whether he doubted as to Mr. Chappell’s competency, and he responded: “Yes, sir; I have stated repeatedly to you here in this room, I am in doubt as to what constitutes competency to make a will. I have had no explanation of that matter. One of these doubts was an entire absence of spontaneity on the part of Mr. Chappell, the testator,

and a further doubt (Mr. Chappell, as I have said, died of the exhausting or asthenic trouble of dysentery; and I was impressed this way, as his medical man—that Mr. Chappell was more—there was a greater portion of physical exhaustion in his case than there was of intellectual exhaustion. I think he was more himself intellectually than he was physically, and that Mr. Chappell lapsed into a condition as we have just been wrangling over) whether he was semi-unconscious or asleep; I am not sure; and the further reason—there are three of them—that Mr. Chappell did not take that interest in the execution of his will that it seems to me he should have done; but whether it was due to physical exhaustion—it may readily have been due to that—or to any decided wish” (evidently meaning *the absence* of any decided wish) “to dispose of his property as suggested by me, I am not sure. He did not appear to me to take that interest in the matter of making his will that I expected of him. Whether this was physical, as it may have been, or want of interest in the matter I am in doubt.” He is then asked this question: “I understood you to state that you doubted then, and still doubt, whether Mr. Chappell had capacity to make a will—a doubt growing out of three things or facts: First, that there was an entire absence of spontaneity on Mr. Chappell’s part in making this will; second, that whilst the will was being written and executed he sometimes lapsed into a condition of semi-unconsciousness; and third, that he did not show that interest in this matter which you would have expected?”

A. “You do not give fully the second reason. It is this: He lapsed into a state, now and then, or occasionally, or sometimes, lapsed into a condition of apparent semi-unconsciousness, and whether that was due to his having fallen asleep, which in his asthenic condition might very readily have been, or to *unconsciousness*, I am undecided, and furthermore, that he did not express or impress me as having that interest in the disposition of his estate which I expected of him. That is as

Opinion.

plain as I can say, and all I have to say of the execution of this will."

Now it clearly appears that Dr. Nelson, in his testimony thus far, has made two apparently contradictory and irreconcilable statements, one of which is that Mr. Chappell did understand what he was doing, and said and did all that was necessary to make the paper in question his last will and testament; the other, that all during this time, and down to the time of his testifying, he doubted whether Mr. Chappell was competent or not. This seeming contradiction of himself was then explained to Dr. Nelson, and he was pressed to make an explanation of the matter; and Dr. Nelson was made to see that there was no room for his doubts, if the matters stated by him were true. And finally he was asked this question: "I want to get into your mind what I am after. I am still at a loss to see how a man with intellectual and physical exhaustion seemed to comprehend what you suggested and intelligently assented to what you suggested. I am at a loss to see where comes in this doubt growing out of his stupified condition."

A. "I have in my mind what you wish to put in it. I can see this, sir; that Mr. Chappell might have consented to what I said to him, and that I might have possibly misinterpreted his consent. I say this, I have always had some doubts, and have given you the occasion of these doubts."

It thus appears that Dr. Nelson, the physician and intimate friend of Mr. Chappell for many years, was not only the active and zealous advocate of the Trents, but persistently and unduly urged their claim upon Mr. Chappell; that he, the only person who was with Mr. Chappell during the whole time of the writing and execution of the will; the one who, by education and long association with Mr. Chappell in the relation of physician and patient, and who, by reason of his professional skill and experience, was best qualified to ascertain and know Mr. Chappell's mental condition—we say that he, after a long hunt, is brought to admit that the will in question was made at his

Opinion.

suggestion "in every particular"; brought to admit that he has doubts—doubts well founded and insurmountable, whether, at the time of the execution of this paper, Mr. Chappell was capable of making a valid will. Can it be said with any degree of reason that a man eighty-five years of age, enfeebled by disease and racked by pain, who assents to a will, cruelly unnatural and unjust, and which clearly appears not to have been the offspring of his own volition, is a free and capable testator? We think not. Can it be said that a paper executed and acknowledged as this was, and assented to by some three ordinary nods, one "reflective nod," one hoarse whisper "yes," and one "I think that would be better," is the true last will and testament of a man possessed of a sound and disposing mind and memory? We think not. And finally, can it be said that a testamentary scheme which did not originate in the mind of the alleged testator, but was wholly dictated or suggested by the attending physician, under circumstances which preclude the idea that the simulated actor knew what he was doing, is a good will? We think not, and the law says not.

The bill in the present case charges both mental incapacity and undue influence by others to procure the will here involved. In the light of the testimony of Ned Trent, of the two subscribing witnesses, and of Dr. Nelson, the attending physician and draughtsman of the will, it seems incredible that any impartial mind could come to any other conclusion than that, at the time of the execution of the pretended will, Mr. Chappell was not possessed of sufficient mental capacity to enable him to make a valid will. But conceding, for the sake of argument, that Mr. Chappell possessed sufficient sanity for general purposes, and sufficient soundness and discretion, if let alone, to regulate his affairs in general, yet it cannot be denied that Dr. Nelson's participation in procuring the will amounts to undue influence, under all the circumstances, and that the paper is more the will of Dr. Nelson than of Mr. Chappell.

Opinion.

Judge Redfield, after a careful review of many adjudged cases on the subject of undue influence, says: "From all this, and much more, which might be adduced from the cases already decided, it is obvious that the influence to avoid a will must be such as—

1st, To destroy the freedom of the testator's will, and thus render his act, obviously, more the offspring of the will of others than of his.

2d, That it must be an influence specially directed towards the object of procuring a will in favor of particular parties.

3d, If any degree of free agency, or capacity, remained in the testator, so that, when left to himself, he was capable of making a valid will, then the influence, which so controls him as to render his making a will of no effect, must be such as was intended to mislead him to the extent of making a will, essentially contrary to his duty, and it must have proved successful, to some extent, certainly." 1st Red. on Wills, 524-5.

Dr. Nelson's participation in procuring this will comes squarely within each and all of the three propositions above laid down. And in a very elaborate and valuable monographic note by Mr. Freeman, appended to the Minnesota case of *In re Hess's Will*, reported in 31 Am. State Reports, 665, will be found a number of cases cited and quoted from, which fully sustain the doctrine in 1st Redfield on Wills, referred to above.

Dr. Nelson, in the ardency of his solicitude in behalf of the Trents, overstepped, though doubtless unwittingly, the boundaries of good judgment and sound discretion, and in doing so, omitted the duty imposed by law, of testing the mental capacity of Mr. Chappell before taking part in procuring the will in question.

It is said by a distinguished author, and the same doctrine runs through the books, that, "The rule for testing the mental capacity of a person to do an act requiring mental comprehension and disposing judgment, given by Dr. Taylor, is as reliable as any one, perhaps. 'If a medical man be present when

the will is made,' says this learned writer, 'he may easily satisfy himself of the state of mind of the testator by requiring him to repeat from memory the mode in which he has disposed of the bulk of his property. 'Medical men have sometimes placed themselves in a serious position by becoming witnesses to wills under these circumstances without first assuring themselves of the actual mental condition of the testator.'"
1 Red. on Wills, 95-6.

Dr. Nelson, as well as the subscribing witnesses, failed to take this necessary precaution, and his failure has resulted in a paper purporting to be the last will and testament of Richard T. Chappell, when the alleged testator is proved by the testimony of the proponents not to have possessed at the time mental capacity to enable him to make a valid will. It matters not that both of the subscribing witnesses say that Mr. Chappell "knew what he was doing," when he did not recognize either of them when they were brought into his room to be made attesting witnesses, when he uttered not a word to them nor they to him, and when, to all appearances, he was utterly unconscious of their presence. It matters not that they say they were right in front of him when they subscribed their names, and that he was looking straight at them at the time; when, from their own evidence, taken all together, it is evident that his look was not that of intelligent comprehension, nor his acts those of a man in the exercise of free and unrestrained volition. In other words, the attesting witnesses, Crank and Terrell, prove nothing to the purpose of establishing the validity of the paper in question as the will of Mr. Chappell, but, on the contrary, by their evidence, facts and circumstances are disclosed which are utterly irreconcilable with the idea of testamentary capacity.

Nor is it material that Dr. Nelson, his attending physician and draughtsman of the pretended will, had conceived a theory inconsistent with the stubborn fact, admitted by him, that he doubted whether Mr. Chappell was possessed of sufficient

Opinion.

mental capacity to enable him to make a valid will; nor that, in aid of this specious theory, Dr. Nelson, after a long, earnest and anxious examination-in-chief, was at last induced to so far break away from his mere impressions as to say, in effect, that he was sure Mr. Chappell knew he was making this will, giving his entire estate to Ned and Eliza Trent; for, on his cross-examination, he again and again repeated and clung to the fact, admitted on his examination-in-chief, that he had *doubts* as to Mr. Chappell's mental capacity, and, so far from weakening, as his cross-examination proceeded, he grew stronger and cleverer in the expression of his doubts, and finally admitted that he may possibly have misinterpreted what, at the time, he took to be Mr. Chappell's assent to *his* (Dr. Nelson's) action in the premises. In other words, Dr. Nelson is not so sure that Mr. Chappell's negative shakes of the head, his three or more ordinary nods, and one *reflective* nod of his head, can be relied upon to show that Mr. Chappell understood what was being done, and gave his free and intelligent assent thereto. Nor is the matter changed when there is superadded the one hoarse whisper, "Yes," which was not remembered by Dr. Nelson when he testified before the county court, but had come to his recollection when he testified at the trial of the issue. Nor is it material that Mr. Chappell made the remark, "that would be better," in reply to Dr. Nelson's suggestion that if he would make a will giving the Trents his estate, he could, in the event of his recovery, change, alter or cancel the will at his pleasure; in the light of all the evidence, and especially that of Dr. Nelson himself, it is too plain to admit of doubt that Mr. Chappell was mentally, as well as physically, too weak to comprehend Dr. Nelson's suggestion with regard to a will giving his estate to the Trents. Moreover, if it could be fairly conceded that Mr. Chappell still retained sufficient mind to answer ordinary questions, yet that is not enough. He must retain sufficient *active memory* to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to

Opinion.

hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them; he must be of sound and discerning mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment with reference to the situation and amount of such property, and to the relative claims of different persons who are or might be the objects of his bounty.

It would seem impossible for any impartial mind, guided by the facts as disclosed by the evidence of the draughtsman of the will, and the two subscribing witnesses, to come to any other conclusion than that Mr. Chappell was not, at the time, possessed of the requisite mental capacity to enable him to make a valid disposition of his property. The few words uttered by him show conclusively that he had no intelligent apprehension of what was transpiring; that the state of his mind, if any he had, was not active and capable, but that he was a mere passive instrument in the hands of Dr. Nelson, at whose suggestion the so-called will was made, in every particular; and that no human being ever heard him seriously intimate any purpose to make any such will, or any provision for the Trents whatever, until within two or three hours prior to the procurement of the paper in question, and that he then proposed to make any provision for them depends upon the statement of Ned Trent alone. On every other occasion, when he spoke seriously with respect to making a will, he uniformly said, "the law makes the best will," or that, "the law makes a good enough will for me."

Dr. Nelson, like the attesting witnesses, proves nothing which seriously tends to support the will. On the contrary, the facts disclosed by him effectually establish the fact that Mr. Chappell was not, at the time of the execution of the paper in question, possessed of a sound and disposing mind and memory; and that the instrument in question, so far from being the free and voluntary act of Mr. Chappell, is, in fact, nothing

Opinion.

other than the will of Dr. Nelson disposing of Mr. Chappell's estate.

When a paper, purporting to be the last will and testament of a free and capable testator, is made under such circumstances as characterize this transaction, and, without any explanation, the next of kin, and heirs-at-law, are wholly disinherited, in favor of strangers to the family and blood, it devolves upon those claiming under the alleged will to explain, by clear and satisfactory proof, how a testamentary disposition so unnatural and so unjust came about. Feeling it incumbent upon them to respond to this humane requirement of the law, and of common sense, the beneficiaries under the alleged will seem to have scoured the country, for many miles around, to produce evidence—first, that Mr. Chappell disliked his blood kin and heirs-at-law; second, that he was much attached to the Trents; and, third, that the will is in accord with the previously expressed intentions of Mr. Chappell. The supporters of the will, in order to come down as near as possible to the time when this will was executed, commence with Mr. William P. Burks, who, in the capacity of laud assessor, was at Mr. Chappell's house in the month of May preceding the death of the latter. He says he had known Mr. Chappell for twenty years; that witness was at Mr. Chappell's in 1881 or 1882, when the latter was just recovered from a severe spell of sickness, and that he (Mr. Chappell) related to witness an amusing incident, to the effect that one of his relatives in the South, hearing of his sickness, had written a letter to the administrator of Richard Chappell; that Mr. Chappell told witness that he had answered the letter to let them know that Richard Chappell was his own administrator, and that they would never get a dollar of his money; that Mr. Chappell did not tell witness who those relations were; but that he said that during his illness they had not inquired after him, or paid him any attention, but as soon as he was thought to be dead, or in a dying condition, they were solicitous of his estate. It is true that the rela-

Opinion.

tive in the South who wrote this letter was premature and over solicitous, but be this as it may, the solicitude thus shown was natural, and was by no means so intense and grasping as that exhibited by the beneficiaries under the pretended will in question.

This witness (Burks) then proceeds to say that he was, up to 1885 or 6, at Mr. Chappell's house twice a year; that he saw Ned and Eliza Trent every time he was there; that when he was first there, Ned was a little boy six or seven years old, riding about the farm behind Mr. Chappell, &c.; that witness had seen Mr. Chappell more with Ned Trent than with the rest of the family; that witness had taken dinner at Mr. Chappell's house, when the Trents were all at the table, and Mr. Chappell was very kind to all, and, witness thinks, he spoiled Ned a good deal while he was a chap. And the witness proceeds to say further, that he was at Mr. Chappell's house in May, 1890, to assess the landed property of the latter; that Mr. Chappell thought that the assessment was too high; that witness said to him, "Well, it don't make any difference much any way; you are going to give out; some one else will pay the taxes on it." That Mr. Chappell thereupon asked witness about his little boy and what his name was, and that witness replied, "Henry Gray," and added, "I will have it changed to Richard Chappell, since I find you have no heirs"; that Mr. Chappell and witness were joking, and that Mr. Chappell laughed, when witness said, "I reckon Ned will get the bulk of your estate," and that Mr. Chappell said, "Yes, but I don't want Ned to know it," and the witness adds, "I did not tell him." Yet he must have told Ned, or some one acting in his interest, or the utterly irrelevant and trifling matter could never have cumbered the record before us.

Next comes John L. Oglesby, who had been, or was, a commission merchant in Lynchburg, who says he knew Mr. Chappell; had, as his commission merchant, transacted business for him; that he never was at his house, and that he only knew

Opinion.

the Trents when they came to Lynchburg; that he had known Mr. Chappell for twenty years; that for all that time, except two or three years, he, or the house of which he was a member, sold Mr. Chappell tobacco; that Ned was a small boy until he came to town on business; that he came in the wagon sometimes, and sometimes behind Mr. Chappell on horseback, and "that they were just as father and son, after that style." When the witness was asked if he ever heard Mr. Chappell say anything about making a will, he answered, "I did, sir"; and then proceeded to say: It was some time after his recovery of a spell he had in 1881; that he and Mr. Chappell had, previous to this, talked socially, and that Mr. Chappell had spoken of his fondness for Ned Trent, Sr.; that witness congratulated Mr. Chappell on his recovery, and reminded him how near he came to death, and not having provided for the Trents; that Mr. Chappell said: "Yes, I intend to give something," and that it was in that connection the thing came up. The witness then says that he said to Mr. Chappell: "Well, you ought to make a will," and that Mr. Chappell replied: "I think the law makes the best will, but in my case there is an exception." The witness then proceeds to say he had heard Mr. Chappell express his feelings toward his relatives, and that he was not friendly towards them.

On cross-examination this witness was asked: "I understand you to say that you reproached him or reproved him for not doing something for Ned, as he had been sick?"

A. "No, sir; I did not say that; it was the senior Trent."

Q. "You said something that he ought to have done?"

A. "I intimated to him; he had told me previously that he would do it; I just asked if he had not better make a will."

Q. "What did he say?"

A. "He said he thought the law makes the best will generally, but in cases there were exceptions; I do not recall the exact words; I want to state that through our family Mr. Chappell knew that I knew of what had transpired backwards,

and we talked a little differently from ordinary business men; there was no relationship between us whatever."

The expression of the witness "transpired backwards," though unusual, is, as respects this case, quite apt. The main trouble in the case is that too many things "transpired backwards." The evidence of this witness, taken in connection with other evidence, clearly establishes three things—first, that the suggestion made by him to Mr. Chappell to make a will and provide for Ned Trent, and Mr. Chappell's reply that he intended to give something, referred to Ned Trent, Sr., and not to Ned Trent, Jr., one of the beneficiaries under the will in question; second, that there was an organized design during the lifetime of Ned Trent, Sr., and while he was the overseer of Mr. Chappell, to procure from Mr. Chappell some provision by will in his favor, and that such design, on the death of Ned Trent, Sr., was earnestly pursued in favor of Ned Trent, Jr., and finally culminated in the so-called will here in question; and, third, that Mr. Chappell, when approached on the subject, prior to the execution of this paper, uniformly declared that the law made the best will.

This declaration, uniformly made by Mr. Chappell, with full knowledge on his part that by his intestacy his estate would descend to his next of kin and heirs-at-law, was tantamount to an express declaration on his part that it was his intention that it should pass to and be enjoyed by them. How absurd, then, is the claim that he disliked his next of kin, was affectionately inclined towards the Trents, and made the will in question in pursuance of a long-cherished purpose. When Mr. Elam, in the interview already referred to, urged Mr. Chappell to make a life provision for his brother, the appellant, Josiah Chappell, he readily agreed to do so; and when, in the same interview, Mr. Elam told him it was reported that he intended to give his estate to the Trents, he indignantly denied the truth of the report, and hooted at the idea of giving the Trents anything.

Still other witnesses are introduced, who testify to like

Opinion.

trifles, which are relied upon to show that Mr. Chappell disliked his next of kin, was devoted to the Trents, and made the will in question in pursuance of a previous and long cherished purpose.

Martin C. Parks testifies that about the year 1887, he was at Mr. Chappell's some two weeks, engaged in peeling and packing bark, and boarded at Mr. Chappell's part of the time; and when asked to tell the jury what were the relations existing between Mr. Chappell and Ned and Eliza Trent—how they treated each other, he answered: "I have remarked a good many times that I never saw anybody kinder to their father than they were to Mr. Chappell, because he said to Ned when he was sick, I wish you would wash my feet, they feel sore, and Ned got the water and washed them; * * *" and the witness was then asked: "Were the relations that existed between them such as existed between landlord and tenant or between employer and employee? What, from their conduct, did you regard as the relations in which they held each other?"

Ans. "I think it was more like a parent to his children, as far as I know; I remember on one occasion I wanted to borrow a horse from Mr. Chappell; when I first went there he had two colts he did not use; when I went to Mr. Chappell he said that is the only horse and Ned rides it, and if he is not going to use it you can have him. I went to Ned and he said I could have him; he said it was Mr. Chappell's horse, and I saw Mr. Chappell and got the horse; it seemed like whatever Ned said to Mr. Chappell was right."

James H. Daniel, another witness for the proponents, testifies in substance that he had known Mr. Chappell for about four years, and had lived about five years some two miles from him, and one year one mile; that he saw Mr. Chappell during his last illness three or four times, and saw him last on the Tuesday night previous to his death, and staid with him all night; that he had some conversation with him at that time, and that he seemed to talk to witness with as good a mind as he ever

Opinion.

knew him to do; that witness knew the Trents; and in answer to a question as to the relations between the Trents and Mr. Chappell, he said: "When I was with them they seemed to regard each other as one family, as well as I know; mighty peaceable family; got along well together."

James H. Oliver, another witness, who was a wheelwright and shoemaker, and lived not over a mile and a half distant from Mr. Chappell, was asked whether he had ever heard Mr. Chappell say anything about his feelings toward his blood relations, and he answered: "About the most I ever heard him say was when I had done some mending; I do not recollect the year, but a good while ago; I did some shoe mending for Mr. Joe Chappell and I did mending for Dick, and when I brought the bill in he said, 'I will settle this with you as I told you I would, but,' he said, 'do not have any more done for Joe; I won't pay any more;' that was all that was said at that time that I recollect of. Afterwards I was up there one day, or the old man was at my house, he used to come to my house very often and sit and talk; I asked him how his brother was, and it was shortly after Mr. Elam went up there; I saw him and knew him when he passed and I thought may be he had heard; he said he did not know how he was getting on; he reckoned he was getting on well; I said I reckoned you would hear from him through Mr. Elam; no, he said, Mr. Elam had come up for money; he had been maintaining Joe, but he was not going to maintain him any longer, and so I asked no more questions about it. And when asked how Mr. Chappell regarded Ned and Eliza Trent, the witness answered, "He always was very fond of them, and Ned, after Mrs. Trent died, he was talking of leaving and I concluded I would let my son go if Ned left, and he and I would undertake the business; I saw the old man and he said he was in hopes that Ned would not go, and we pretty much agreed on our bargain if Ned would not stay, and he hoped to keep Eliza; he said they were good children and good to him; he spoke about Ned's mother, and when she died

Opinion.

he told her that he intended to take care of Eliza as long as she lived, and he would do it. That was about all that was said. I did not ask any questions about what he intended to do."

James Weber, another witness, testifies that he had known Mr. Chappell about twenty-five years, and for ten or fifteen years he had lived about a mile and a half of him; that he saw Mr. Chappell during his last illness several times, but did not remember exactly when; that he did not have any conversations with him when he saw him, as witness saw he was weak and it hurt him to talk and witness said very little to him, but Mr. Chappell always told witness he was very glad to see him and asked witness how all were at home, and particularly witness' "old lady, as he knew she was in bad health." And being asked what was the relationship between Mr. Chappell on the one side and the Trents on the other, the witness answered, "They were just as one family, particularly fond of each other; they were just as good to him and took as good care of him as if they were his own children. I have heard him talk of them many a time and their mother; he did not think there was such a woman in the world: she died about three years ago—before Mr. Chappell."

Then comes Eliza Trent, one of the beneficiaries. Her testimony is to a large extent but a repetition of that of Ned Trent as to what occurred after the arrival of Dr. Nelson at Mr. Chappell's, on the occasion when the will was written, and just before the writing thereof. Much of her testimony is devoted to explaining the terms of the contract between Mr. Chappell and her father, to which Ned Trent succeeded on the death of her father; and much more of her testimony is immaterial to the question under consideration.

However, in speaking of the relations existing between her father and mother and Mr. Chappell, she says: "When my father and mother lived with Mr. Chappell they lived pretty much as one family together: that Mr. Chappell furnished them for the table meat and bread and cows, and my mother

Opinion:

kept the house and furnished everything else—furniture for the house and other provisions except meat, bread, and milk. We furnished the furniture for his room; my mother looked after his clothes as long as she lived, and I looked after them afterwards. We did not have any servant on the premises at the time of his death. I was attending to the household duties; my brother married, but I attended to the house as if he was not there.” When asked what she did about the household during her mother’s lifetime and afterwards, she answered: “I did pretty much all the cooking, milking, cleaning up, and kept house and everything, and Mr. Chappell was as a father, as you would say, in the house.” When asked how Mr. Chappell treated Ned when he was a small boy, she answered: “Just as if he was his own son; he would take him around and show him places to interest him; he would take him to ride, and tied him up behind him to ride when he was too small to hold on; he would show him little interesting things which he thought would amuse him about the place—stock, &c.” * * * Again, she was asked: “Did Mr. Chappell ever in his lifetime make any promise that he was going to provide for you or your brother by will?”

A. “When my mother died I was disturbed; all he said was that we need never suffer.”

Q. “And so far as it comes to your knowledge, he made no promise to you or your brother that he would ever make any special provision further than you state?”

A. “No, sir.”

Moreover, on her cross-examination, Eliza Trent effectually puts to rest the much paraded question respecting the horse furnished by Mr. Chappell for Ned Trent to ride. She says the horse was furnished three or four years before Mr. Chappell’s death, and that during that time Ned was managing the farm; that it was a tolerably large farm, 1,200 acres or so; that Ned did not manage all of it, part thereof being rented

Opinion.

out; and that after Ned became manager Mr. Chappell furnished him a horse.

This was certainly a sensible and economical arrangement on Mr. Chappell's part, which enabled his overseer, Ned Trent, to overlook so large a farm with greater expedition than on foot, and thus save and devote to actual farm work much valuable time. At all events, this explanation by Eliza Trent effectually precludes all idea of the furnishing the horse evinced Mr. Chappell's devotion to Ned Trent, and aids in accounting for this strangely unnatural, unjust and unexplained will.

Again, Mr. Chappell died on Saturday, and on the following Monday his brother, the appellant, Josiah Chappell, in company with Mr. Ingham, arrived at his dead brother's late home and remained there with the Trents until the succeeding Wednesday morning. And it is an uncontroverted fact that Dr. Nelson, when the pretended will was executed, sealed it in an envelope, handed it to Eliza Trent, and told her to put it away or take care of it. Eliza Trent says she saw Mr. Joe. Chappell and Mr. Ingham who came there on Monday after Mr. Chappell died, and that they staid until Wednesday morning. Being then asked if she said anything, either to Mr. Ingham or Mr. Joe. Chappell about this will, she answered: "I do not think they asked."

Q. "And you never told them anything about it?"

A. "No, sir."

Q. "They were there until the Wednesday morning? You had the will?"

A. "Yes, sir; I was not authorized to show it; the paper was sealed in an envelope."

Notwithstanding this very singular statement, it clearly appears from the testimony of C. H. Terrell, one of the subscribing witnesses, that Ned Trent handed him the will not later than Tuesday morning, and that he [Terrell] took it with him to Lynchburg that day, and had it at Maj. Kirkpatrick's office at the time of the conference with him before referred to. It

Opinion.

follows, therefore, that, whilst Mr. Joe Chappell was at the late home of his brother, and the guest of the Trents, the sealed envelope was broken open and the will delivered to Ned Trent, by whom it was in turn delivered to Terrell, who took it with him to Lynchburg; and in that time Terrell had made at least one copy of the will, which he handed to Mr. Joe Chappell on his return from Lynchburg on Tuesday afternoon. And yet Eliza Trent attempts to excuse herself for not saying anything to Mr. Ingham and Mr. Josiah Chappell about the will, upon the grounds (1) that she was not authorized to show the will; and (2) that the will was sealed in an envelope; when, in fact, she had broken, or had permitted the sealed envelope to be broken, and the will had passed, through the hands of Ned Trent, into the custody of Terrell, and had been used by him as before stated. It is, therefore, not true, as stated by her, that she had the will during the stay of Mr. Ingram and Mr. Joe Chappell, and that she was not authorized to show it, because it was in a sealed envelope; but it is true that it was handed to her sealed up, with directions to put it away, or to take care of it; which directions she disregarded by breaking it open, or permitting it to be done, and the will to pass into hands to which it had not been intrusted.

Finally, as if to give a finishing touch to this class of testimony, resorted to for the purpose of showing Mr. Chappell's dislike of his blood kin, his love and affection for the Trents, and that the pretended will is in accordance with his previously expressed intentions, Mrs. Overstreet, a sister of Ned and Eliza Trent, a sister-in-law of Crank and Terrell, the attesting witnesses, and a widow living with said Crank, is introduced, and, in answer to questions, she, under very peculiar circumstances, makes some most remarkable disclosures.

It seems from her statement that she was at Mr. Chappell's on the 25th day of March, 1890, the day on which Ned Trent was married to the daughter of one Bartholomew Gaddy; that Mr. Chappell wanted a button sewed on his pants that he

Opinion.

might wear them the next day when Ned was to bring his bride home, and that, in his dilemma, he called on Mrs. Overstreet to do him the service of sewing on the button, which she did; and, while she was performing this service, it seems that Mr. Chappell, a remarkably reticent man, both in respect to his own affairs and those of his family, completely unbosomed himself to her. She was asked:

“What were the relations that existed between Mr. Chappell and Mrs. Trent and Ned?”

A. “They were always kind of affectionate as he could be, both they to him and he to them.”

She was then asked this question: “Did you ever hear Mr. Chappell say anything about his feelings towards his own kindred?”

A. “Yes, sir; it was in March last time I heard him speak of it—the March before he died in June; he brought a pair of pants to me and asked me to sew a button on, and I was sewing, and he began saying how bad it was not to have good clothes, and said he was not able to buy them, and I said, ‘Yes, Mr. Chappell, if you want them,’ and he said, ‘You know how much money I have lost and paying Joe’s board.’ He says: ‘I have paid the last cent I ever intend he shall have; they have threatened to carry him to the poorhouse, and he may go and die there.’ Those were the words of Mr. Chappell, and he looked at me and said: ‘You think it is harsh, but if you had a brother like Joe, and he treated you as he has treated me, you would not blame me’; and I have heard him say that when they were both boys he treated him bad; Mr. Dick Chappell was the elderest.”

On cross-examination this witness was asked:

Q. “Did he tell you the bad treatment his brother had bestowed on him?”

A. “Not that day; but I have heard him tell it many times that Joe beat him, when he was young, with the tongs.”

This story is, upon its face, too improbable to be believed,

Opinion.

and in the light of the uncontradicted evidence of Josiah Chappell himself, a very full reference to which has already been made, the whole story is utterly unworthy of credit. From the statement of Josiah Chappell, which bears the very impress of consistency and truth, it may readily be seen that his life and actions were so intimately interwoven with the life and actions of his elder brother, Richard T. Chappell, that it would be next to impossible to relate the history of the life of the one without that of the other. In their early boyhood they were put at a boarding school together. Later, when their father had died, leaving them both comfortable fortunes, and when they grew to manhood, Richard, the elder, went to Bedford, took charge of his estate there, and lived on it, having an overseer named Oglesby. The younger brother, Josiah, remained near the old homestead, in Charlotte county, married into the Armistead family, and formed a partnership with a Mr. Fuqua and engaged in the mercantile business.

Not long after he commenced operating his estate in Bedford, Mr. Richard T. Chappell became involved in a difficulty with his said overseer, and beat him so severely that he was sued and had to respond in damages to the extent of \$3,000. This loss so prayed upon him that it dethroned his intellect. He abandoned his estate in Bedford, returned to the old neighborhood in Charlotte, where he roamed around, night and day, threatening violence to many of the neighbors, including his own aged mother. He was taken in hand by authority of law, and, it being deemed best for him, and his estate being ample, he was sent to a private asylum in Philadelphia, where he remained two years or more, and then made his escape and returned to the old neighborhood in Charlotte county, but still the victim of his severe mental malady, and still breathing dire threats against his old neighbors, who, feeling insecure, desired that he be rearrested and sent back to the asylum. But at this juncture his brother, Josiah, interceded in his behalf, proposed to take charge him, put him in his store, and

Opinion.

make the effort to restrain, quiet and restore him. This arrangement was acceded to, and it worked so well that it was not very long before Mr. Chappell was so far restored as to dispel all apprehensions of danger theretofore entertained.

During the confinement of Mr. Chappell in the asylum, and afterwards, as long as his malady lasted, his brother, Josiah, acted as his committee, and, as such, made his regular annual settlements, there not being an intimation that he did not in every particular faithfully discharge his trust. In the meanwhile Fuqua, the partner of Josiah Chappell in the mercantile business, failed and the business was closed. Josiah Chappell then gave his brother Richard a home under his own roof, where the latter remained for a number of years, and until long after he had recovered from his mental malady. After he had so recovered, and had resumed the control of his affairs, he still seemed averse to returning to Bedford; and he urged his brother, Josiah, to continue to direct the management of his estate in Bedford, which the latter did for some time, and there was not an intimation that he was not true to his brother's interest during this period. During this period Josiah Chappell was in comfortable circumstances, and was extending to his older brother all the comfort and aid suggested by duty and brotherly affection. But Josiah had become security for his friends, his partner in business had failed, and he had become embarrassed. Then came the civil war, the destruction of his slave property, the insolvency of his friends for whom he was surety, and the result was that, after the war, he was forced into bankruptcy, surrendered everything he possessed, and, in his old age and feebleness, he was left to shift for himself, receiving, for a few years, the small pittance of one hundred dollars per year from his brother Richard for his board at Mr. Elam's, in Charlotte. Such in substance are the facts brought to light by the testimony of Josiah Chappell; in all of which we can but see the dutiful devotion of Josiah to his older brother during the period of his affliction, and the mutual trust,

Opinion.

confidence and affection between the two brothers until the Trents came between them.

Moreover, after the war, and after Mr. Chappell returned to his estate in Bedford and employed the elder Trent as his overseer, Josiah Chappell, then poor and dependent, did not have the means with which to pay horse hire, and could not visit his brother in Bedford as often as he desired, but he for some years managed to visit him frequently—sometimes remaining a few days, and at other times as many weeks. During these visits he worked on the farm as if he had been a common hireling. He cut timber, mauled rails, built fences; he worked in the crops, looked after and fed the stock, cows, &c., and even cut and prepared wood for the Trents to cook with. If, in the least particular, the facts thus disclosed by Josiah Chappell had been untrue it was easily susceptible of proof; but no effort is made to disprove any statement of his, and his statement must be taken as undeniable. There seems to have been a system of espionage on the life, habits, and conversations of Mr. Chappell. Every conversation of his, whether with officers of the law visiting him on official business, casual visitors, and others, except his real neighbors, is overhauled and the most trivial things—"trifles light as air"—are raked together and thrust into the record as evidence that Mr. Chappell disliked his kin, was all love and devotion to the Trents, and that the will in question was made in pursuance of a long-cherished design on the part of Mr. Chappell. Upon this subject counsel for the propounders became so enthusiastic as to lose sight of the solid facts in the case, and say: "The testator's relations and feelings towards the Trents by one unbroken chain of testimony, in which there is no dissenting voice, were of the kindest and most paternal nature, creditable alike to both, and continued from father to son, from mother to daughter. The neighbors expected, from their relations, that he would give the Trents his estate. Close in his counsel, reticent about his affairs, as he always was, he still had intimated to friends, in

Opinion.

no way connected with the Trents, that he had the purpose to provide for them. He told John L. Oglesby vaguely, that he meant to provide for old Mr. Trent. He told Wm. P. Burks that Ned would get a considerable part of his estate. He cautioned both to keep quiet about it, which was well. He told Mr. Trent on his death-bed that Mrs. Trent and Eliza should never want for anything. He said when Eliza was grieving for her mother's loss that *he* would take care of her. He intimated to Terrell, Edward Trent's brother-in-law, when he found the young man wished to strike out for himself, that it would be the best for him not to go."

These conclusions of counsel are not, in most material respects, sustained by the real facts. We fail to discover in the record any evidence whatever that seriously tends to show that Mr. Chappell's neighbors, or any one of them, ever for a moment expected Mr. Chappell to give his estate to the Trents. None of them say so. Ned Trent himself certainly expected nothing of the kind; for, in his statement of the conversation between Mr. Chappell and himself just before Dr. Nelson was sent for to fix the matter, he says that Mr. Chappell proposed to make some provision for him and Eliza—not to give them his entire estate—and, as already shown, when Dr. Nelson arrived and made known the object of his visit, Mr. Chappell was utterly unconscious of the alleged conversation between him and Ned Trent so short a time before.

Dr. Nelson expected nothing of the kind; for he opened his interview with Mr. Chappell by saying: "I came over to see you about making some provision for the Trents," and receiving no response, he then proposed a deed conveying them a portion of his estate, and still getting no response, he then proposed assigning to them one of his certificates of deposit, to which Mr. Chappell is said to have responded, "I think not"; and then followed Dr. Nelson's proposition in respect to the will, which, as already shown, was the will, not of Mr. Chappell, but of Dr. Nelson disposing of Mr. Chappell's estate.

Opinion.

The only neighbor of Mr. Chappell who intimates anything of the kind, is Terrell, one of the subscribing witnesses, whose statement, in substance, is that he would not have been surprised at any time at Mr. Chappell making a will in favor of Ned and Eliza; but Terrell admits that he never heard Mr. Chappell intimate any intention to make any such will, or any will whatever. As to Mr. Chappell's reply to the inquisitive suggestion of Mr. William P. Burks, and the remark made by Mr. Chappell to Terrell when Ned Trent had determined to leave Mr. Chappell and strike out for himself, they are too utterly insignificant to require further comment.

Again, counsel say: "He" (Mr. Chappell) "said when Eliza was grieving for her mother's loss, that *he* would take care of her." Such is not the statement of Eliza Trent herself. In answer to the question: "Did Mr. Chappell ever in his lifetime make any promises that he was going to provide for you or your brother by will?" she answered: "When my mother died I was disturbed; all he said was that we need never suffer."

It is doubtless true, as claimed by counsel for the propounders, that Mr. Chappell was urged, during the lifetime of old Mr. Trent, to make some provision for him, and it may be true that he intimated a purpose, as to John L. Oglesby, to make some provision for the old man; but what possible relevancy or influence can all that have to the one question of prime importance in the present case, which is, was the will in question the offspring of the free and unrestrained volition of the alleged testator? In other words, was Richard T. Chappell, at the time of its procurement, a free and capable testator?

Again, in their over wrought zeal, counsel say: "Add to all this that it is shown by an absolutely unanimous array, that the domestic intercourse, the personal relations, the kindness, service, and duty in sickness and in health, were those which obtain between a grand-father, or father, and good and dutiful children, every way worthy of his love," &c. All this is but

Opinion.

a splendid exaggeration, unsupported by the real facts of the case, and having no existence save in the heated imagination of the advocate. Mr. Chappell, as was well said by one or more witnesses, had little, if any, love for anything except his money or property. Notwithstanding all the gush of witnesses about his love and affection for the Trents, and especially Ned and Eliza, Mr. Chappell, so far as shown by the record, never gave to any one of them a single copper's worth of anything. He was a man of ample fortune, but, even in his last sickness he did not furnish Eliza Trent the least help in performing the coarse and heavy drudgery of her house work; nor did he furnish any such help at any time after the death of Eliza's mother. Where there is such love and devotion as that attributed to Mr. Chappell, it is sure to be demonstrated in some substantial way. Ned Trent was simply Mr. Chappell's overseer. He superintended the work on the farm and worked thereon as a common laborer. The relations between Mr. Chappell and him were those of employer and employee, or more strictly speaking, that of principal and agent, or master and servant, nothing more, nothing less. Eliza Trent, on the death of her mother, succeeded to the duties and obligations of housekeeper. She did, unaided, the milking, cooking, washing and other drudgery incident to housekeeping. Such were the social and domestic relations existing between Mr. Chappell on the one hand, and Ned and Eliza Trent on the other, and the effort on the part of the latter to change or elevate, by comparison, the relations thus existing to those of a fond grand-father, or father, and loving, dutiful children, is not warranted by the facts, and is simply absurd.

Again, the record contains much evidence clearly evincing that neither Dr. Nelson nor Crank and Terrell, the attesting witnesses, believed the paper in question to be valid as the last will and testament of Richard T. Chappell. This is shown (1) by their efforts to conceal the existence of the alleged will; (2) by declarations to the effect that there was no will; and (3) by

Opinion.

their consulting counsel in order to determine whether or not the paper should be offered for probate.

On the day previous to Mr. Chappell's death, Thomas Crank and Terrell were sitting under the shade trees in front of Mr. Chappell's house, when Crank asked Terrell if Mr. Chappell had done anything with his property, had made a will, or anything of that sort, and Crank says that Terrell's reply was, "Not that anybody here knows." On his cross-examination, Terrell's attention was called to this conversation. At first he disclaimed seeing Crank on that occasion, but when asked the question, "Don't you remember you and he sitting under the trees in the yard on Friday, the day before he (Mr. Chappell) died, and that he asked you whether Mr. Chappell had done anything with his property?"

A. "No, sir; I remember he asked me the question indirectly, but I think it was on Sunday, the day on which Mr. Chappell lay a corpse; we were sitting under the trees, and Mr. Crank said to me, 'I wonder if he had done anything with his property,' or something to that amount. I do not know that I can recollect the words, and I replied, 'If he had he kept it mighty quiet,' and changed the conversation."

Q. "Did not you say if he had done it, nobody knew anything about it?"

A. No, sir, I did not. He asked me indirectly and I answered him evasively."

Q. "Why did not you tell him the truth?"

A. "I had not been authorized to tell people he had made a will, and did not want to be a busy-body. I tried to tell him as politely as I could. I did not care to talk."

Q. "What did you tell him?"

A. "If he had, he kept it mighty quiet."

Q. "After Mr. Chappell was dead and gone, why should you be so reticent about it and so particular?"

A. "Because I did not care to publish it. I thought it was for the court to publish a will."

Opinion.

Q. "You wanted to keep it until you gave it to the court?"

A. "Until somebody asked questions who had some right."

It seems, however, that Terrell had no such scruples when he obtained possession of the paper, took it to Lynchburg, and exhibited it in Major Kirkpatrick's office, and afterwards delivered a copy of it to Mr. Josiah Chappell. But Terrell says his answer to Thomas Crank's question as to what disposition, if any, Mr. Chappell had made of his property, was, "If he had, he kept it mighty quiet," while Crank says his answer was, "Not that anybody here knows." It is not which is correct, the difference being as to phraseology merely; and whether the one or the other be correct, the meaning is the same, and could only have been intended to convey the idea that Mr. Chappell had made no will; and yet the paper in question had been executed on the preceding Tuesday, and Terrell was one of the subscribing witnesses.

Again: Terrell says Crank's question was indirect and his answer was evasive. We fail to discover anything of the kind. The question was a plain, direct inquiry as to whether Mr. Chappell had made a will disposing of his property, and the answer, to the effect that there was no will, was equally plain and direct.

On the Monday or Tuesday after the Mr. Chappell's death, Terrell was passing the house of Joshua Rucker, an old neighbor and friend of Mr. Chappell, when Rucker hailed Terrell, and, after the usual salutations, asked him if Mr. Chappell had left a will, and that Terrell replied, "No, if he has, Dr. Nelson knows all about it." And Mr. Rucker states that he communicated to Dr. Nelson what Terrell had told him, and that he asked Dr. Nelson if Mr. Chappell had left a will, and that Dr. Nelson's reply was that Mr. Chappell had made no will, and the property would go to his brother and two half sisters. Mr. Terrell admits that Mr. Rucker asked him the question as above stated, but attempts to modify the effect of his answer by stating that his response was, "If he did, I reckon Dr. Nel-

Opinion.

son knows all about it." Here again the difference is merely as to phraseology, the evident intention being to create the impression that there was no will; nor can the answer be differently interpreted.

It will be remembered that the paper in question was executed on Tuesday and that Mr. Chappell died on the following Saturday; that one of the attesting witnesses, Crank, had been with Mr. Chappell from about 9 o'clock of that day and remained there until the alleged will was executed, when he went home and did not again see Mr. Chappell during the remaining four days of his life; that Terrell, the other attesting witness, who says his presence on that occasion was purely accidental, though it was shown that he was there by reason of his solicitude about Mr. Chappell's will—we say that he (Terrell) remained at Mr. Chappell's until late that evening, when he went home. On Wednesday morning, the day after the execution of the paper in question, Terrell was passing along the road from his house to Mr. Chappell's. Mr. Dibrell Oglesby, with Hannibal Walker, a colored man, and others, were in a field by or near the road along which Terrell was that morning passing, engaged in working tobacco.

On his cross-examination, Terrell's attention was called to the occasion, and he was asked: "Mr. Terrell, do you remember on the day after this will was written, or the next day between the time that the will was written and Mr. Chappell's death, that you, in passing Mr. Dibrell Oglesby's, and when they were in the grounds at work, they hailed you and had a conversation with you in regard to Mr. Chappell?"

A. "I do not; I have no remembrance of it whatever, and I do not believe that they ever mentioned the subject to me."

Q. "Do you not remember having a conversation there with Dibrell Oglesby in the presence of a colored man by name of Hannibal Walker?"

A. "No, sir; I do not."

Q. "Do you not remember that Mr. Oglesby asked you how

Opinion.

Mr. Chappell was, and that you told him that you had been there the evening before—as I understand it, the evening the will was written; this was on Wednesday that you had been there the evening before, and that he was as low as a man could be, and that he did not know you or anybody else, and was out of his mind, or did not have any mind, and that you would not be surprised to find him dead that day?”

A. “I never made any such statement to Mr. Oglesby.”

The witness evidently anticipated what was coming, and brusquely answered that he had never had any conversation with *them* on the subject, before anybody's name, except that of Mr. Oglesby, had been mentioned, and before the subject of inquiry had been disclosed. But be this as it may, Dibrell Oglesby and Hannibal Walker both swear positively as follows:

Dibrell Oglesby: “Yes, sir; Mr. Terrell was passing; I was out in the tobacco ground myself, and three other persons; Hannibal Walker and we were working tobacco, and Hannibal called my attention to Mr. Terrell passing by, and I hollered to him and told him ‘Good morning.’ I asked him how was Mr. Chappell the last time he saw him; he says, ‘I left Mr. Chappell's house last night about dark, and he was just as low as he could be; I would not be surprised to find him dead when I get there.’ I said, ‘Did Mr. Chappell know anybody?’ and he said, ‘No, he did not know anybody, and had not known anybody for several days.’ I said I was thinking of going down to see the old gentleman, but if he does not know anybody, it is hardly worth while. I locate that this was on Wednesday, because on Thursday Albert Fowler went for a preacher, but did not get one, and I repeated the conversation in the field where they were all at work that day, and that was the Thursday before he died Saturday. He told me he had left there the evening before; that was Tuesday.”

Hannibal Walker: “Mr. Terrell was passing, and I called his [Mr. Oglesby's] attention, and they passed good morning,

Opinion.

and Mr. Oglesby said, 'when was the last time you was over there,' [at Mr. Chappell's], and he said, 'I left there last night about dark, and Mr. Chappell was just as low as a man could be;' and Mr. Oglesby asked him if he knew anyone, and he said no, that he had not known anyone for several days; Mr. Oglesby said, 'I was thinking of going over to see the old man, but if he does not know anyone it is no use going;' that conversation occurred on Wednesday, and Mr. Chappell died on the following Saturday."

This testimony is in perfect accord with that of several other witnesses, all of whom state positively that Mr. Chappell, for some eight or ten days prior to his death, was incapable of transacting any business. But Terrell denies outright having had the conversation with Dibrell Oglesby, testified to by him and Hannibal Watkins, and they and the others, under the statutory rule, § 3484, Code 1887, must be pushed to the wall with the stigma of discredit necessarily affixed to them. Surely it is an unjust and oppressive rule that puts it in the power of any court or jury to sanction such a result. But such is the prescribed rule, and this court must enforce it by disregarding all these disinterested witnesses introduced by the contestants, the appellants, and giving full faith and credit to the statements of Terrell, who could but feel a deep interest in the cause of the beneficiaries, Ned and Eliza Trent, his brother-in-law and sister-in-law.

Counsel for the propounders, in their printed argument, give a numerical statement of the witnesses introduced by the defendants in the issue, the appellants here, and also a brief, though very imperfect, summary of their testimony. It is a singular fact that in referring to Dibrell Oglesby and Hannibal Walker, whose very important statements are above set out at large, summarily disposes of them as follows: "5th. Dibrell Oglesby saw him (Mr. Chappell) once, in the daytime, the week before the will was made; gives no opinion." "6th. Hannibal Walker, a negro, called to contradict Mr. C. H. Terrell."

Opinion.

This mode of treating these witnesses is not fair. Their statements speak for themselves, though lost to the cause, and their statements are sustained by an overwhelming array of the true neighbors and friends of Mr. Chappell, in no way connected with him or with the Trent family, and without any interest that could even tempt them to misrepresent the facts. However, in the cross-examination of Hannibal Walker an incident occurred which is worthy of notice. Counsel for the propounders seemed rather disposed to scout as unseemly presumption the interest manifested by this humble colored man in the health and well-being of Mr. Chappell, and he was asked this question :

“ You were particularly anxious to find out how Mr. Chappell was? Were you a friend of his? ”

A. “ My mother belonged to him and I was raised there, and every time he saw me he seemed to appreciate me. ”

There is in this answer that touch of true manhood and sensibility which every honorable man admires as a priceless jewel, whether its possessor be a white man or a black man; and it carried with it a gentle but telling rebuke, of which counsel seem not to have been insensible, for that style of examination was at once abandoned.

Now, as to Dr. Nelson again. On his cross-examination he was asked :

“ Did not Mr. Coffee ask you after this will had been made, in the afternoon at the postoffice, if Mr. Chappell had made a will, and did you not reply he had not; moreover, Mr. Chappell had not been in a condition to make a will for eight or ten days? ”

A. “ Mr. Coffee asked me a question and I answered it evasively, neither affirming or denying there was a will, and Mr. Coffee does not assert that. I am very positive I never said that Mr. Chappell had not been in a condition for eight or ten days to make a will. ”

Opinion.

Q. "Did not you ride from the postoffice for some distance with Mr. Morris H. Dinwiddie?"

A. "Yes, sir."

Q. And did you not, during this conversation with Coffee, and in the conversation with Mr. Dinwiddie, remark to him that Coffee was mighty interested about Mr. Chappell's will?"

A. "I did, sir, because he had repeatedly asked about it."

Q. "And did not you tell Mr. Dinwiddie that Mr. Chappell had no will to make?"

A. "I did not; and if he asserts that, he asserts what is an untruth."

Q. "And if he wanted to give Miss Trent or Ned Trent anything he could have given them one of the certificates of deposit?"

A. "I did not; I never said anything to him; I wish to state what occurred at the postoffice; I came to the postoffice and some one asked me (which Mr. Coffee had asked me on several occasions) some question bearing on Mr. Chappell's making a will, and I was a little tired of it, and thought it a piece of impertinence anyway, because I thought it was not right to disclose the contents of the will until it was offered for probate, and he asked the question (or some other person by the store) had Mr. Chappell made a will; deeming it an impertinent inquiry, I answered evasively, neither affirming or denying: 'Do you suppose, I having been Mr. Chappell's friend and physician for thirty years, he could have made a will without my knowing it?' simply evasive, that was my purpose, and was my only purpose as my memory serves; Mr. Coffee made himself officious in regard to Mr. Chappell's will."

Such is Dr. Nelson's statement as to whether there was a will. He admits that his answer to the question was: "Do you suppose, I having been Mr. Chappell's friend and physician for thirty years, he could have made a will without my knowing it?" But he seeks to break the force of what he

Opinion.

thus admits by saying he deemed the question "impertinent, and that his answer was simply evasive, neither affirming or denying the existence of a will." This will not do. The question put to him was a plain, direct, and most natural one, and his answer was equally direct, clearly importing that there was no will, nor is it conceivable that the answer was intended to convey any other idea. He says he didn't think it right to disclose the contents of the will until it was offered for probate. Very well. But the question put to him did not seek the contents of the will, but only to ascertain whether there was a will. There was no necessity for evasion. He could, with the utmost propriety, have answered, "There is a will, but I do not feel authorized to make known its contents until it is offered for probate." This would have silenced inquiry, and all would have abided such an answer. But be this as it may, both Mr. Dinwiddie and Mr. Coffee concur in saying that in answer to Mr. Coffee's question, Dr. Nelson said: "Henry, Mr. Chappell has made no will that I know of; I being his friend and physician for thirty years; if he had done so I would have known something of it, and moreover, he had not been in a condition to make a will for eight or ten days."

Marshall Crank, a witness for the propounders, who heard the conversation between Mr. Coffee and Dr. Nelson, fully corroborates the statements of Mr. Dinwiddie and Mr. Coffee, except that he does not remember that Dr. Nelson said that Mr. Chappell had not been in a condition for eight or ten days to make a will. He does say, however, that Dr. Nelson did say: "Henry, Mr. Chappell has made no will; if he had, I being his physician and friend and neighbor for the last thirty years, would have known it." Dr. Nelson, however, denies saying there was no will, and denies saying that Mr. Chappell had not been in a condition for eight or ten days to make a will. The result is that to this extent the testimony of these witnesses must, under the arbitrary application by the jury, of the rule above referred to, be rejected as unworthy of belief.

Opinion.

But, take Dr. Nelson's own admission that he did say, "do you suppose, I having been Mr. Chappell's friend and physician for thirty years, he could have made a will without my knowing it," and it is enough. Its plain meaning is that Mr. Chappell had made no will, and all effort to explain away this palpable meaning is simply idle. On Sunday, the day Mr. Chappell was buried, and when returning from the grave to the house, a witness asked Dr. Nelson who would get Mr. Chappell's property, and the reply was that his brother and two half sisters would get it. A very short time thereafter we find Dr. Nelson and Mr. Terrill conferring together under the shade trees about the old Chappell house. In that consultation, Dr. Nelson suggested the importance of a full conference between himself, the beneficiaries—Ned and Eliza Trent—and Crank and Terrill, the attesting witness, when Terrill proposed that the conference, the admitted object of which was to determine what course should be taken with respect to the will, and whether it should or not be offered for probate, be held at his house, and it was accordingly held there. When these facts, showing a pre-arranged purpose to conceal the existence of the will, are taken in connection with the facts immediately attendant upon the execution of the pretended will, it is a matter of profound surprise that the jury should have found a verdict in favor of the pretended will. That the jury did so find can only be accounted for upon the theory that they were misled by the action of the court in refusing certain instructions asked for by the defendants in the issue, and in giving in lieu thereof certain other instructions asked for by the plaintiffs in the issue.

The instructions have already been set out in the statement of the case and they need not be repeated. In fact, they need only be considered in a general way, so as to indicate in what respects they were misleading and, therefore, erroneous.

I. The defendants in the issue asked for two instructions, designated respectively as "C" and "D"; to both of which

Opinion.

the plaintiffs in the issue objected and offered in lieu thereof instructions 6 and 7; and the court sustained the objection of the plaintiffs in the issue and gave said instructions 6 and 7; and thereupon the defendants in the issue moved the court to give as a substitute for said instruction the instruction "E" offered by them; but the court overruled the motion and refused to give said instruction "E" in lieu of said instruction "6". The action of the court in these respects constitutes the subject of bill of exceptions No. 1, taken by the defendants in the issue.

The first instruction ("C") asked for by the defendants in the issue, asserts the simple and undeniable proposition that "undue influence is any means employed upon and with the testator by which, under the circumstances and conditions by which the testator was surrounded, he could not well resist, and which controlled his volition and induced him to do what otherwise would not have been done."

If the controlling question in the case had been whether or not the will in question had been obtained by "undue influence," then this instruction would have been absolutely without fault; and inasmuch as the bill charges both want of testamentary capacity and "undue influence," and the instruction being addressed to the latter subject, it should have been given as asked.

II. The second instruction ("D") says: "When an old man eighty-five years old, of greatly impaired health and enfeebled mind, away from his next of kin and in the custody of persons of no kin, is induced to make a will giving to such persons his entire estate, the law requires that such persons must clearly prove that the will was the free and voluntary act of the testator and an intelligent expression of his wishes respecting the disposition of his property."

This instruction accurately describes the situation and surroundings of the testator, at the time of the execution of the

pretended will; it correctly states the law, and should also have been given as asked.

Instruction "6," given at the instance of the plaintiffs in the issue in lieu of instruction "C" asked for by the defendants in the issue, contains four propositions, in which there is much laid down as law, which is frequently found in adjudged cases as well as in the books of text writers, but which is not strictly applicable to the circumstances of the case in hand. For instance, the first of these four propositions is that what is undue influence such as to overcome the will or control the judgment of the testator, is a question that largely depends upon the circumstances of each case, chief of which are the dispositions contained in the will, the situation of the testator and his mental and physical condition at the time the will was made.

This language, to the average juror, is but a glittering generality tending rather to confuse than to aid a jury in the investigation of the particular case in hand. The language is intended simply to announce the universally admitted fact that no general rule, applicable alike to all cases, can be formulated.

The second proposition is that, "influence to vitiate an act must amount to force and coercion; obstructing free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, that might be a very strong ground in support of the testamentary act."

Under the peculiar circumstances of this case, the language "influence to vitiate an act must amount to force and coercion," is inappropriate and calculated to mislead. Undue influence is often defined in the books as that degree of influence which amounts to force and coercion, but more frequently, or certainly with greater accuracy, as that degree of influence which destroys free agency. "*Coerce*," says WEBSTER, "had at first only the negative sense of chocking or restraining by force; as, to *coerce* subjects within the bounds of law. It has now

Opinion.

gained a positive sense, viz., that of driving a person into the performance of some act which is required of him by another; as, to *coerce* compliance with the conditions of a contract; to *coerce* obedience. In this sense (which is now the prevailing one), *coerce* differs but little from *compel*, and yet there is a distinction between them. *Coercion* is usually accomplished by indirect means, as by the operation of law or the force of circumstances. Threats and intimidation are very often resorted to. Physical force is more rarely employed."

The word *coerce*, to the ordinary mind not trained to nice distinctions, naturally carries with it the idea of physical force or threats of personal violence. Now, in the present case, it is not pretended that any physical force was applied, or any threats of violence resorted to. Then how natural it was for the jury, when told that "influence to vitiate an act must amount to force and coercion," that inasmuch as there was in this case no application of actual physical force, and no threats of personal violence, therefore the will in question is the spontaneous offspring of a sound and disposing mind and memory, and is, therefore, the true last will of the alleged testator. It is, to say the least, most likely that the jury took this view of the subject and were thus erroneously led to a verdict in favor of the will.

The third proposition contained in this instruction (6) is, that "there must be proof that the act was obtained by this coercion, by importunity that could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force or fear."

The first part of this proposition, that "there must be proof that the act was obtained by *this coercion*, that is, there must be proof that the influence exacted amounted to *force and coercion*, as asserted in the preceding proposition, simply intensifies the objectionable feature set forth in said preceding or second proposition. The language employed in the latter part of this third proposition in respect to importunity that could not be resisted

and that the act was done merely for the sake of peace, &c., when taken in connection with the antecedent language in respect to proof of coercion, is ambiguous, and is, moreover, obnoxious to the objection that it leaves out of view the first and all-important question of testamentary capacity, and assumes that the will is valid unless it be shown to have been procured by importunity that could not be resisted, or was made merely for the sake of peace. In other words, it is assumed, in effect, that the alleged testator was possessed of the requisite mental capacity to enable him to make a valid will, and upon that unwarranted assumption the argument is shrewdly suggested to the jury, that unless it be shown that the will was the result of importunities that could not be resisted, or was made purely for the sake of peace, then the paper in question must be upheld as the true last will and testament of Richard T. Chappell.

The fourth and last proposition contained in said instruction "6" is as follows :

"On the other hand, where the provisions of a will accord with the affections and previous declarations of the testator, and are such as might have been justly expected, these are facts tending to prove both testamentary capacity and freedom of action."

This proposition is open to the same objection as that considered in discussing the preceding, or third, proposition. It is, in effect, an argument in support of the theory attempted to be set up by the plaintiffs in the issue, to wit: that the will in question was not only a righteous and natural one, but the only one that could be made in conformity with Mr. Chappell's *affections* and *previous declarations*, and such as might not only have been justly expected, but was expected by all of Mr. Chappell's friends and neighbors. The proposition itself is based upon the erroneous assumption that the so-called will was made in pursuance of the alleged testator's affection for the Trents and in accordance with his *previous declarations*.

Opinion.

This view has been already met and refuted. Mr. Chappell's alleged affection for the Trents is but a myth. No *previous declarations* of his, tending in the least to indicate any purpose on his part to make any such will, or any will whatever, are proved. On the contrary, all his *previous declarations* were to the effect that "the law makes the best will," or "the law makes a good enough will for me." Nor is it proved that any neighbor or friend of Mr. Chappell expected him to make any such will. The direction contained in this proposition should not have been given to the jury. What is here said applies equally to instruction "7," given by the court at the instance of the plaintiffs in the issue, in lieu of instruction "D," asked for by the defendants in the issue.

The defendants in the issue asked the court to give instruction "E" as a substitute for said instruction "6," given by the court at the instance of the plaintiffs in the issue and in lieu of instruction "C," asked for by the defendants in the issue. This instruction ("E") is so badly punctuated as to somewhat mar and obscure its meaning, and is in one respect elliptical—it being obvious from the context that in the third sentence thereof, after the words "discretion or wish," the words "is overborne" are omitted and should be inserted in order to make the meaning clear. So understanding the instruction and correcting it in the respects mentioned, it is as follows:

"The court instructs the jury that to make a good will a man must be a free agent, but all influences are not unlawful; appeals to the affections or ties of kindred, to gratitude for past services, or pity for future destitution, or the like, are all legitimate, and may be fairly urged on a testator. On the other hand, pressure of whatever character, if so exerted as to overpower the volition without convincing the judgment, is a species of restraint under which no valid will can be made. Importunity which the testator has not the will or strength to resist, and to which he yields for peace and quiet, if carried to a degree in which the testator's judgment, discretion, or wish

Opinion.

is overborne, will constitute undue influence, though no force is used or threatened. In other words, his will must be the offspring of his own volition, and not the record of the wishes and desires of some one else; and in considering whether the testator's free volition had been overborne or controlled, the jury must consider his age, his physical and mental condition, and all the circumstances surrounding the testator."

This instruction, like all the others embraced in the bill of exceptions now under consideration, is addressed to the question of undue influence. It is clear and unambiguous in expression, and, as respects the question of undue influence, it states the law with unquestionable accuracy, and it should have been given. We are, therefore, clearly of opinion that the court below erred in rejecting said instructions C, D, and E, and in giving said instructions 6 and 7.

The defendants in the issue also asked the court to instruct the jury as follows:

"The court instructs the jury that no will is valid unless in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to make it manifest that the name is intended as a signature, and moreover, unless it be wholly written by the testator, the signature must be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator."

This instruction is in pursuance of the statute, and should have been given in the form in which it was presented; but the plaintiffs in the issue objected, and moved the court to add thereto the following:

"If a will has been signed by some other person in the presence of the testator, and by his direction, it is not required that such direction be in any particular form. It may be by the spontaneous direction of the testator, or by the suggestion of a third person accepted and adopted by the testator." There

Opinion.

was no possible necessity for, nor propriety in, making this addition. The statute covers the whole ground, and the instruction as asked for is in the language of the statute. The addition in question was manifestly calculated to serve as an argument to enforce the theory of the plaintiff's in the issue before referred to. The court below erred in giving it. This disposes of the second bill of exception of the defendants in the issue. The subject of the third and last bill of exceptions taken by the defendants in the issue, is the action of the court overruling this motion to set aside the verdict of the jury, upon the ground that the same was contrary to the law and the evidence. From what has already been said, it follows that the court below erred in this respect also.

The case necessarily turns upon the question whether the testator, at the time of the execution of the paper in question, was possessed of a sound and disposing mind and memory. It is a singular fact in this case, where all the material circumstances so conclusively show the want of testamentary capacity, that that subject is practically ignored in all the instructions given by the court. Upon this subject the jury should have been instructed in clear, strong, and unambiguous terms, that it must appear, by clear and convincing evidence, that the testator, at the time of the execution of the paper, retained sufficient *active mind and memory* to enable him to collect and arrange in his mind, *without prompting by others*, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and to be able to form some rational judgment in relation to them; and that, if he was unable to do this without prompting, he was incompetent to make a valid will. As was said by Chancellor Walworth, in *Clarke v. Fisher*, *supra*: "The general principles in relation to the capacity of a person to make a will are well understood. He must be of sound and discerning mind and memory, so as to be capable of making a testamentary disposition of his prop-

Opinion.

erty with sense and judgment in reference to the situation and amount of such property, and to the relative claims of different persons who are or might be the objects of his bounty." So, in *Dare v. Jackson*, *supra*, in charging the jury it was said: "That a disposing mind and memory is a mind and memory which has the capacity of collecting, discerning, and feeling the relations, connections, and obligations of family and blood."

* * *

That Mr. Chappell did not, in the light of the controlling facts in this case, have a mind and memory capable of performing such functions is too clear to admit of doubt. It may be stated as an undeniable fact that there is not the slightest evidence that the idea of making any such will as that in question ever, for one moment, had a lodgment in the mind of Mr. Chappell. The whole scheme was conceived in the mind of Dr. Nelson, and was carried through by him without any intelligent consciousness or participation on the part of Mr. Chappell. Dr. Nelson swears positively that the will was made at his suggestion, in every particular, and that there was an entire absence of spontaneity on the part of Mr. Chappell. Moreover, Dr. Nelson had doubts—well founded and insurmountable doubts—as to Mr. Chappell's capacity to make a valid will. It is, then, perfectly clear that the alleged will is solely the result of Dr. Nelson's prompting, without any intelligent participation on the part of Mr. Chappell, and is, therefore, invalid and void.

Much is said in argument in vindication of Mr. Chappell's assent to Dr. Nelson's suggestions. It is undoubtedly true that a testator may adopt and act upon the suggestions of a third person; but this pre-supposes a testator possessed of a sound and disposing mind and memory, and has no application to a case like this, in which the requisite testamentary capacity is not proved to exist. When a free and capable testator adopts and acts upon the suggestions of a third person, it is just the same as if the suggestions had originated in his own mind. Much is also said in vindication of the formal

Opinion.

execution of the paper. It is true that the two subscribing witnesses, with Dr. Nelson and Mr. Chappell, were present together at the death-bed scene when the paper in question was executed; that the subscribing witnesses attested the paper right in front of him, and, as they say, Mr. Chappell was looking straight at them. But it is equally true that, when they were called in to attest the paper, Mr. Chappell did not even extend to them the ordinary greeting, when he had not seen one of them (Terrell) for some two days. Mr. Chappell uttered not even a word to them, nor they to him. He did not request them to attest his will, nor did either of them ask if he desired them to do so. They simply stood by and acquiesced in the pantomimic display being conducted by Dr. Nelson. This was not *presence* in the true sense. The word *presence*, as used in the statute, means *conscious presence*. *Baldwin v. Baldwin's ex'or*, 81 Va., 405; *Tucker v. Sandige, Curator*, 85 Va., 546. They were present and alive to what was going on; but how was it with Mr. Chappell? He was there, a dying man, and still breathing and living; but, in the light of all that transpired at the execution of this pretended will, he was no longer possessed of the essential element of intelligent consciousness, without which there could be no valid will.

After the most careful investigation and study of the whole record, and giving to the appellees the full benefit of the rule in respect to demurrers to evidence, we are forced to the conclusion that the paper in question is not, in the light of the facts and circumstances disclosed by the record, the true last will of the alleged testator, Richard T. Chappell. We are, therefore, of opinion to reverse and annul the judgment and decree of the court below, to set aside the verdict of the jury, and to remand the cause to said circuit court for a new trial of said issue in accordance with the views expressed in this opinion.

LEWIS, P., and HINTON, J., dissented.

JUDGMENT AND DECREE REVERSED.

Richmond.

FARINHOLT v. LUCKHARD.*

FEBRUARY 23d, 1886.

CONSTITUTION—*Construction—Laboring man.*—Clause 2, section 1, article XI, of the constitution of Virginia declares that the homestead exemption of a debtor shall not extend to any execution, order, or other process issued on any demand for services rendered by a laboring person or a mechanic: *held*, a mail carrier is a laboring person in the sense of the constitution.

Appeal from decree of circuit court of ——— county, rendered ———, 188—, in a chancery cause wherein D. A. Farinholt was complainant and Hardin A. Luckhard was defendant. The decree being adverse to the complainant, he appealed. Opinion states the case.

HINTON, J., delivered the opinion of the court.

The bill in this case alleges that the plaintiff, D. A. Farinholt, in August, 1875, entered into a contract with one Hardin A. Luckhard for the purpose of transporting the United States mail from West Point to Gloucester Courthouse. That by this contract Luckhard obligated himself to assign and transfer all orders and warrants that he should receive to the plaintiff. It charges that Luckhard, in violation of his contract, had assigned one of said warrants to H. R. Pollard to secure the sum of \$65, but that there was a balance of \$73 remaining in the hands of the assignee to which the plaintiff was entitled, and that Luckhard is indebted to the plaintiff in an amount much

* Ordered to be reported in 90 Va.

Opinion.

larger than the amount now in the hands of said Pollard. It then charges that Luckhard is insolvent; and asks that the assignee, Pollard, may be enjoined and restrained from paying over and the said Luckhard may be enjoined from collecting the said balance until a common law suit, which then pending, for the recovery of damages under said contract, could be determined. The injunction was awarded, but on the hearing of the cause, the court "deciding that the claim of homestead asserted in the answer (of the defendant Luckhard) embraces the \$73," dissolved the injunction and dismissed the bill.

The plaintiff asserts that he is a "laboring man" within the meaning of these words as used in article XI, § 1, of the constitution of Virginia, and insists that Luckhard's claim to this balance, as a part of his homestead exemption, cannot be sustained as against the claim of the plaintiff thereto, "for services rendered as a laboring person"; and this is the single question to be determined, and it depends upon the construction which must be given to the phrase "laboring man."

Bouvier defines "laborer" as "a servant in husbandry or manufacture, not living *intra mœnia*," and no doubt this was the original technical meaning of the word. It was usually applied to those employed in toilsome out-door work as distinguished from domestic servants. But this was not the exact sense in which the words "laboring person" are used in the constitution. "A constitution," says Allen, J., in a noted case, "is an instrument of government, made and adopted by the people for practical purposes connected with the common business and wants of human life. For this reason pre-eminently, every word in it should be expounded in its plain, obvious, common sense." *The People v. Cent. R. R. Co.*, 24 N. Y., 486; *Gibbons v. Ogden*, 9 Wheat, 188. This rule has a direct application to this case. It would be difficult, if not impracticable, to give any general definition of the words "laboring man" which would at once include all the cases falling within the words and exclude those falling without. And I shall not attempt to

Opinion.

do so. But we think it safe to say that the word "laborer," when used in its ordinary and usual acceptation, carries with it the idea of actual physical and manual exertion or toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable physical labor, the contracts made with their employers. It is in this sense that the words "laboring man" were used in the constitution. The framers of that instrument, in giving to a large class of people a homestead exemption, clearly designed that it should not affect that class of persons who were dependent upon their own manual labor for the support of themselves and their families, and whose necessity for the prompt and certain payment of their wages they regarded as paramount even to the claims of the debtor to a homestead.

Assuming then that the words "laboring man" were used in the sense indicated above, it seems to us clear that the plaintiff must be regarded as a laboring man within the meaning of these words as used in the clause of the constitution under review. This case is analogous to the drayman who hauls the goods of the merchant along the streets of the city, perhaps with his own wagon and horses, or to the ploughman who habitually, and perhaps with his own team, is accustomed to break up the lands of his wealthy neighbors. The mail carrier in this case is clearly a laboring man. Few employments could be more arduous than the one in which he was engaged, and the mere circumstance that he happened to own the horse and vehicle used by him in carrying the mail, cannot deprive him of the character of laborer.

I am, therefore, of opinion that the circuit court of King William county erred in dissolving the injunction and dismissing the bill; its decree must therefore be reversed and the injunction must be reinstated to await the determination of the action at law.

DECREE REVERSED.

INDEX.

ADMINISTRATOR. (*See Personal Representatives.*)

ADVERSE POSSESSION.

1. Railroad company's right of way to land conveyed to it under agreement with grantor that he might use any portion of it not needed by the company, he to yield possession whenever it should be needed by the company, is not affected by its being unenclosed, vacant of buildings, or unoccupied at any time. *King v. Railroad Co.*, 210.
2. *Married women*.—It appearing that the four children held jointly, adversary possession of the land until 1843, when the fourth child was under the disability of coverture and remained such till after 1881: held, there could be no adversary possession against her in favor of her co-tenants during her coverture. *Buford v. North Roanoke L. & I.*, 418.

ALIMONY.

1. *Rule*.—The general rule is that the husband's income is the fund from which allowance for alimony is allowed. *Heninger v. Heninger*, 271.
2. *Education of children*.—Where husband's estate consists of unimproved land, the net income of which is not clearly shown: held, that a decree which requires the husband to provide for his wife and five infant children a permanent home and \$1,000 a year for alimony and the support and education of the children, will not be affirmed, though the jurisdiction of the court to provide for the education of the children is unquestionable. *Idem*.

APPEAL.

1. *Record—Judgment*.—A writ of error will not lie where the record does not show the judgment of the trial court, but merely recites that judgment was entered. *Read's Case*, 168.
2. *Decree of sale*.—Decree for sale of land in partition suit, though interlocutory, is appealable under Code, § 3454, as it requires change of title and possession, especially where it settles the principles of the cause. *Stevens v. McCormick*, 735.

APPELLATE COURT.

1. *Objections too late*.—In the appellant court, objection cannot be made for the first time that a person served on the jury without being selected by the court or summoned by the sheriff. *Short's Case*, 96.
2. *Question unanswered*.—Assignment of error in refusing to allow a witness to answer a certain question is unavailable in the appellate court where the record does not show what the answer would have been. *Taylor's Case*, 109.
3. *Jurisdictional amount*.—Where suit in chancery is brought to enforce upon land a judgment for more than \$500, and the defendant pleads set-offs, which being allowed, the decree against the defendant is for less than that sum, this court has not jurisdiction of the defendant's appeal from the decree. *Kendrick v. Spotts & Gibson*, 148.
4. *Jurisdiction—Decree*.—A recital in a decree that all the defendants had been duly summoned, is conclusive on appeal in the absence from the record of anything to the contrary. *Moore v. Green*, 181.
5. *Record—Review*.—As the clerk can add nothing to the record, agreed facts copied by him in the record and certified as the facts, whereon the judgment rested, cannot be considered here and the case cannot be reviewed in the absence of a bill of exceptions to the supposed errors of the trial court. *Johnson v. Norton Land & Improvement Co.*, 267.
6. *Depositions*.—Nor is a deposition a part of the record in the absence of a bill of exceptions, though copied in the transcript and certified by the trial court and clerk. *Idem*.
7. *Error—Facts not certified*.—Where neither the evidence nor the facts are certified, this court cannot review a judgment setting aside a verdict and awarding a *venire de novo*. *Mallory v. Taylor*, 348.
8. *Jurisdiction*.—Where claim of each appellant is less, though the aggregate be more, than \$500, no appeal lies, unless the questions as to all are the same, and they have been consolidated. *Craig v. Williams*, 500.
9. *Appellate practice—Bills of exception*.—Where no formal bills of exception appear from the record to have been filed to any ruling which was made prior to the rendition of the verdict, *held*, all exceptions, or points saved, during the trial, must be considered as having been abandoned. *Whalen's Case*, 544.
10. *Appellate practice—Inferences—Verdict*.—Where record shows no conflict in the evidence (or question as to the credibility of witnesses), this court has the same opportunity to draw correct conclusions from the facts as the trial court and the jury possessed. *Strode v. Clement*, 533.
11. *Commissioner's report—When not disturbed*.—A question of fact determined by commissioner upon contradictory evidence, and approved by lower court, cannot be disturbed on appeal, unless the error be palpable. *Magarity v. Succop's Adm'r*, 561.

APPELLATE COURT—*Continued.*

12. *Jurisdiction—Coupons.*—This court hath jurisdiction on appeal, of an action necessarily involving the validity of coupons cut from bonds issued under Acts March 30, 1871, and March 28, 1879, relating to the funding and payment of the public debt, and offered in payment of taxes, although less than the jurisdictional minimum is involved, as the validity of those acts is brought in question. *Commonwealth v. McCullough*, 597.
13. *Mandamus—Jurisdiction—Answer.*—Code, section 3094, providing that a writ of *mandamus* shall issue and be tried at the place of session of this court at which writs of error to such court are to be tried, *held*, controlling as to the place where the jurisdiction in the present case is to be exercised. *Hotchkiss v. Grattan, Judge*, 642.
14. *New trial—Bill of Exceptions.*—Where neither the facts nor the evidence is certified in the record, this court cannot review a decision of the trial court overruling a motion for a new trial. *Brown's Case*, 671.
15. *Exceptions—Review.*—Where trial court refuses plaintiff leave to amend his declaration, and no exceptions to the rulings are taken before verdict, this court will not review such action of the trial court. *Gibson v. Beveridge*, 696.
16. *Decision—Conclusiveness.*—Whatever is contained in the record on an appeal is supposed to have been passed upon, and whatever is passed upon here, and whatever might have been passed upon, in consideration of the record, is concluded and settled, and cannot be reopened by the lower court. *Krise v. Ryan*, 711.
17. *Objections too late.*—In action on notes for price of said wagons, where breach of the said warranty is pleaded under Code, § 3299, *held*, too late to object in this court for first time that the wagons were warranted as "farm wagons" and were used for other purposes. *Milburn Wagon Co., v. Nisewarner*, 714.
18. *Evidence—Bills of exceptions.*—In determining questions of admissibility of evidence, this court cannot look outside of the bills of exception taken to its exclusion. *Lake v. Tyree*, 719.
19. *Appellate practice—Demurrer to evidence.*—This court will consider an assignment of error in the court below overruling motion for a new trial in the light of a demurrer to evidence, when not the facts but the evidence is certified. *Smith's Case*, 759.
20. *Too late.*—Where for the first time the point is raised in this court that a promise in the note to pay, in case of a suit, five per cent collection fees and fifty dollars attorney's fee, is an unenforceable penalty within the ruling of *Rixey v. Peurre*, 89 Va., 113; *HELD*: Too late now to raise the point. *Ronald v. Bank of Princeton*, 813.
21. *Destruction of negotiability.*—Conceding that such a promise might destroy the negotiability of the note, yet the averment that the note

APPELLATE COURT—*Continued.*

was delivered for the sole purpose of being discounted, not having been proved: *held*, such concession would avail the appellants nothing. *Idem*.

ASSESSMENTS.

Joint stock company—Defences—Subscriber—Transferee.—Though in suit to collect assessments to corporate stock from subscriber, he may set up under Code, § 3299, the defences of failure of consideration, fraud in the procurement of the contract, or any other matter which would entitle him to relief in equity, yet, *held*, those defences are personal to him, and do not pass to the transferee of the stocks. *Lewis v. Berryville Land and Improvement Co.*, 693.

ASSIGNER AND ASSIGNEE.

1. *Judgments.*—Judgment not docketed in county wherein land of the debtor lies, and is sold under decree in partition, does not, upon being docketed in said county, become a lien upon bonds for the purchase-money in hands of assignee who has no notice of the judgment, though no title to the land was retained, and those bonds being personalty, and no execution had been issued. *Logan v. Panmill*, 11.
2. *Declarations.*—Declarations, either oral or written, of assignor that a chose in action had been paid: *held*, inadmissible unless made before the assignment thereof, and the same is true as to vendor of property after sale as against vendee thereof. *Ginter v. Breeden*, 565.
3. *Exchange of lands—Liens.*—In 1859, by written contract, H. and B. exchanged lands, B. giving bonds for boot. H. sold his tract to G. and I., taking their bonds. No conveyances. H. assigned some of the bonds to plaintiff. Then H., G., I., and B.'s widow essayed to annul the exchange, the sale, and the bonds. H. took his former land back, and sold it to L. on condition he would assume payment of B.'s bonds, and the widow took possession of B.'s former land; but no care was taken of the assignee's interest: *held*, the assignee can subject H.'s former land to the lien of B.'s bonds, and B.'s former land to the lien of the bonds of G. and I. *Idem*.

ATTACHMENT.

1. *Where returnable.*—All attachments, whether by regular writ or by indorsement on the summons, must be returned to a term of the court where pending. *Craig v. Williams*, 500.
2. *Where returnable.*—Under Code, § 2964 and § 2965, attachments must be made returnable to a term of the court wherein the same is pending. *Grinberg & Morris v. Singerman*, 645.

BAGGAGE. (*See Carriers.*)**BANKRUPTCY.**

1. *Sale—Validity.*—Where land is sold under proceedings in bankruptcy, persons interested in the land, but not parties, are not bound by the sale, though the bankrupt was the administrator of the estate through which they claim. *Moorman v. Arthur*, 455.
2. *Limitation of action—Laches.*—The federal statute limiting actions by or against assignees in bankruptcy as to property vested in them to two years, applies not to suits against purchasers from such assignees. Nor can the claims of persons to said property be barred by *laches*, so long as they are ignorant of their rights. *Idem*.
3. *Witnesses—Competency.*—Two defendants, against whom no relief was prayed for, and who had been discharged in bankruptcy, *held*, not incompetent to testify, though parties to the suit and to the transactions under review therein. *Idem*.
4. *Declarations of Trust—Notice to purchasers.*—Where petitioner in bankruptcy appends to inventory of his property a declaration that one parcel had been bought with trust money, though it stood in his name, such declaration is unauthorized by the federal statute, and constitutes no notice of such trust to purchasers at the sale under the bankrupt proceedings. *Idem*.
5. *Idem—When admissible.*—Such declarations to be admissible must have been made when declarant had no interest to make them, and not when made in favor of his own family against his creditors, by one who is not only insolvent, but in bankruptcy. *Idem*.

BILL OF EXCEPTIONS.

1. An entry in the order book that defendant excepted to a certain ruling of the trial court will not supply the place of a bill of exceptions. *Clark's Case*, 360.
See Practice at Common Law.
2. *Appellate practice.*—Where no formal bills of exception appear from the record to have been filed to any ruling which was made prior to the rendition of the verdict, *held*, all exceptions, or points saved, during the trial, must be considered as having been abandoned. *Whalen's Case*, 544.

CARRIERS.

1. *Construction of contract—Ejection of passenger.*—Ticket provided that when presented to conductor, passenger should sign his name thereto, and "otherwise identify" himself as original purchaser thereof. Passenger offered to sign ticket, which offer conductor refused, and ejected him from train for refusing to pay fare: *held*,

CARRIERS—*Continued.*

- conductor not entitled to require passenger to "otherwise identify" himself, and defendant company was liable in damages for the expulsion. *N. & W. R. R. Co. v. Anderson*, 1.
2. *Exemplary damages*.—Where in such case the defendant company subsequently ratified conductor's acts, plaintiff is entitled to exemplary damages. *Idem*.
 3. *Measure of damages*.—Amount of defendant company's liability must depend on the circumstances, and be left largely to discretion of the jury, whose verdict will not be disturbed unless it evinces passion, prejudice, or corruption. *Idem*.
 4. *Passengers—Detention—Loss of baggage*.—Passenger with wife and two children, one very sick, bought at B. tickets to W. and was assured by defendant's officials that a through sleeper was attached to the train. Entering sleeper, he paid for two berths, and was assured by its conductor that it would go through. Suddenly, without notice to him, sleeper was cut loose, and the train went on carrying off his baggage, including the child's clothing and medicine, part whereof was lost. Sleeper was left on the track at night when it was too late to get into a hotel or drugstore. This distressing situation was produced by the negligence of the defendant's officials, of whom said conductor was one: *held*, defendant is liable to plaintiff in an action for the retention and loss of baggage, in damages to an amount equal to the value of the property and the time lost, but not to punitive damages. *Railroad Co. v. Lipscomb*, 137.
 5. *Detention of cars—"Demurrage"*.—A railroad company may make a reasonable charge for delay in unloading cars after notice of arrival to the consignee, and such charge is not for transportation, storage, or delivery of freight within Code, §§ 1202, 1203, which declare that no charge other than that provided by law shall be made. *Railroad Co. v. Adams*, 393.
 6. *Idem*.—A charge to a consignee of one dollar a day after three days for every car remaining unloaded after notice of arrival, *held*, not unreasonable. *Idem*.
 7. *Act of God—Liability*.—By the bursting of a water spout, water accumulated at a fill in railroad track in a larger quantity than could be carried off by the stone culvert built there thirty-five years before and always regarded as safe, causing a washout and break in the track, into which, during a dark, stormy night, the engine and some of the cars of a passenger train were precipitated, without any negligence on the part of the carrier, and thereby a passenger came to his death: *held*, carrier was not liable for the injury. *Railroad Co. v. Marshall's Adm'r*, 836.

CASES COMPARED AND DISTINGUISHED.

1. *Railroad Co. v. Wysox*, 82 Va., 250, compared with and distinguished from *Railroad Co. v. Anderson*, 1.
2. The facts in the case of *Clark's adm'r v. Railroad Co.*, 78 Va., 700, are dissimilar from the facts in the case at bar except that in both cases the death was caused by collision with an overhead bridge. *Beard's adm'r v. Railroad Co.*, 351.
3. *Nagle v. Newton*, 22 Gratt., 814, and *Campbell v. Rust*, 80 Va., 653, compared with and distinguished from the case at bar. *Witz, Beidler & Co., v. Mullin's Per. Rep.*, 805.
4. *Piedmont Club v. Commonwealth*, 87 Va., 540, distinguished from case at bar. *Lewis' Case*, 843.

CHATTEL MORTGAGE. (*See Mortgage.*)

CHILDREN.

1. *Legitimacy—Invalid marriage—Case at bar.*—Wife leaves her husband and goes to another State. He marries again, and has children born of the second marriage before the first is dissolved; *held*, those children are legitimate. *Heckert v. Hile's adm'r*, 390.
2. *Idem—Cases compared.*—The case of *Greenhow v. James*, 80 Va., 636; *held*, not to overrule *Stones v. Keeling*, 5 Call, 143. *Idem*.
3. *Custody of children—Doctrine.*—The future welfare and interest of the child is the paramount consideration as respects its custody against the claims of either or both of its parents, and notwithstanding a statute recognizing the superior rights of the father. *Slater v. Slater*, 845.
4. *Idem.*—Where the father, though not very affectionate, is yet thoughtful and solicitous for the personal and spiritual welfare of his family, and successful in business and able to provide for them, whilst the mother, though affectionate, is dependent on her parents for support: *Held*: The children must be committed to their father. *Idem*.

COMPROMISE.

Criminal proceedings—Seduction—Compromise—Instructions.—At such trial the jury were instructed that no compromise between the parties, or any one else, could bar the prosecution: *HELD*: No error; nor is an instruction in the language of the statute, Code, § 3677. *Barker's Case*, 820.

CONDITIONAL SALES. (*See Sales.*)

CONSTITUTION.

Construction—Laboring man.—Clause 2, section 1, article XI, of the constitution of Virginia declares that the homestead exemption of a

VOL. XC—119

CONSTITUTION—*Continued.*

debtor shall not extend to any execution, order, or other process issued on any demand for services rendered by a laboring person or a mechanic : *held*, a mail carrier is a laboring person in the sense of the constitution. *Farinholt v. Luckhard*, 936.

CONSTITUTIONALITY OF STATUTES.

1. Any act whose necessary operation impairs, or tends to impair the supremacy of the Constitution, is void, no matter what may have been the purpose of the legislature in enacting it. *Isaacs, &c. v. City of Richmond*, 30.
2. *City council—Notes as currency.*—Under an ordinance in 1861, city of Richmond issued notes to circulate as currency. Evidence showed that one object was to aid the rebellion : *held*, the notes were void. *Idem*.
3. *Special legislation.*—Code § 2486 giving liens to persons furnishing supplies to a manufacturing corporation on all its property, superior to deeds of trust, &c., executed since March 21, 1877, is not contrary to amendment 14 to the constitution of the U. S. as being special and class legislation. *Va. Devel. Co. v. Crozer Iron Co.*, 126.
4. *Habeas corpus.*—K. was received in the penitentiary October 16, 1885, from the city of Richmond, and again February 14, 1891, from New Kent county. He was taken February 5, 1892, before the circuit court of said city and arraigned and identified as the same person who had been twice convicted, and was sentenced to five years additional confinement. These proceedings were under Code, §§ 4179, 4180, 4181, 4182, and 4183. On his petition for a writ of *habeas corpus* : *held*, those sections constitutional and valid, and the proceedings under them were regular, and the writ is denied. *King v. Lynn, Sup't*, 345.
5. *Coupons—Taxes—Schools.*—The coupons attached to the bonds issued under Acts March 30, 1871, and March 28, 1879, and expressed on their face to be receivable at and after maturity for all taxes, debts, dues, and demands due the State, evince an entire contract, incapable of separation ; and such contract, being in violation of the constitutional provision in regard to setting apart the literary fund of the State for public school purposes in so far as it makes the school taxes payable in such coupons, (as decided by the U. S. Supreme Court in *Vashon v. Greenhow*, 135 U. S., 716) : *held*, wholly unconstitutional and void. *Commonwealth v. McCullough*, 597.
6. *Appointment of justices.*—Code, § 97, authorizing county courts to appoint additional justices to the number specified in the constitution when the public service requires it : *held*, not violative of sections 2 and 4, article 7 of the constitution, and not an unwarranted delegation of legislative power. *Ex parte Bassett*, 679.

CONSTITUTIONALITY OF STATUTES—*Continued.*

7. Code, § 3295, has no application to the case at bar. *Gibson v. Beveridge*, 696.
8. Code, § 1292.—That section providing that for every failure of a telegraph company to deliver or forward a dispatch as promptly as practicable, the company shall forfeit one hundred dollars to the person sending the dispatch, or to the person to whom it was addressed : *held*, not repugnant to the constitution of the United States. *Western Union Tel. Co. v. Bright*, 778.

CONSTRUCTION OF STATUTES.

1. Liens for supplies given by § 2485, priority over deeds of trust, &c., executed since March 21, 1877, are not restricted to deeds of trust, &c., executed between that date and the date of the taking effect of that act, but have precedence over deeds of trust, &c., executed after the latter date. *Va. Devel. Co. v. Crozer Iron Co.*, 126.
2. *Vested rights—Impairment of charter.*—Section 2485 giving prior liens upon the property of manufacturing corporations for supplies is not invalid as impairing the charter right of such corporation to issue its bonds and secure them, as the charter was taken subject to the general law of the State, and such changes as might be made in that law.—*Idem.*
3. *General laws—Private acts—Acts of incorporation.*—Section 4203 excluding from operation of the Code any act passed by the legislature between March 15, 1887, and May 1, 1888, applies only to the acts of a general nature and not to acts of incorporation, which are private acts.
4. *Supplies—What are under § 2485.*—Pig iron furnished a rolling mill, whose business is to manufacture iron, steel, and other metals, is "a supply" within the meaning of § 2485, giving a lien to all persons furnishing fuel and other supplies necessary to the operation of any manufacturing company. *Idem.*
5. *Liens for materials—Priority.*—Liens given by § 2485 are entitled to precedence as among themselves according to the times at which they are severally filed under § 2486, that first filed taking preference. *Idem.*
6. *Subsequent legislation.*—Nor is the rule altered as to this case by Acts 1893-4, p. 494, amending Code, § 3156, as the amendment was not intended to be retrospective in its action, statutes being always to be construed to operate *in futuro*, unless a retrospective effect be clearly intended. *Myers' Case*, 785.

CONTINUANCE.

1. *Criminal proceedings.*—For the principles on which continuances are granted in criminal cases see opinion of Lacy, J. *Welch's Case*, 318.

CONTINUANCE—*Continued.*

2. *Idem.*—A day before trial a summons was issued and delivered to the sheriff for a witness residing in the same town. The summons was returned "not found." Defendant made affidavit to his materiality and that he could not safely go to trial without him. Trial court overruled the motion for continuance on the sole ground that the statements of the defendant under oath were not to be credited: *held*, error. *Idem.*
3. *Speedy trial.*—Motion for continuance is always within the sound discretion of the court, to be exercised fairly with due regard to the circumstances and the law enacted pursuant to article 1, section 10, of the constitution, declaring that "in all criminal prosecutions a man hath a right to a speedy trial." *Benton's Case*, 328.
4. *Idem.*—Defendant, in jail since September, 1892, all the time ready for trial, demanded trial on February 15, 1893, his case being set for trial on that day. Commonwealth announced that it had made no preparation for trial on that day, and had recalled processes for witnesses and could offer no evidence at that term. The court then continued the case until March 16th, the day of expiration of sentence of commonwealth's witness, B, who was then in jail for a felony, and incompetent to testify: *held*, such continuance was a reversible error. *Idem.*
5. *Amendment.*—Where plaintiff is allowed to make at bar an immaterial amendment to his declaration, *held*, not error to refuse defendant a continuance on that ground. *Railroad Co. v. Brown*, 340.
6. *Criminal proceedings.*—After a former conviction set aside on appeal, defendant moved for a continuance for absence of a material witness from sickness, but convalescent and able to attend (in defendant's opinion), at the term to which he moved the case to be continued, though the physician stated there was but little chance of his recovery; *held*, refusal to grant the continuance was a reversible error. *Phillips' Case*, 401.
7. Under the circumstances set forth in the opinion, *held*, not error to deny the motion for continuance. *Railroad Co. v. Humphreys*, 425.
8. At a murder trial the motion of accused for a continuance on the ground that an absent person, who had not been summoned, would, it was rumored, testify that one of the commonwealth's numerous witnesses present at the homicide, was an ex-convict, was overruled: *held*, no error. *Myers' Case*, 705.

CONTRACTS.

1. *Carriers—Construction of contract—Ejection of passenger.*—Ticket provided that when presented to conductor, passenger should sign his name thereto, and "otherwise identify" himself as original pur-

CONTRACTS—*Continued.*

- chaser thereof. Passenger offered to sign ticket, which offer conductor refused, and ejected him from train for refusing to pay fare: *held*, conductor not entitled to require passenger to "otherwise identify" himself, and defendant company was liable in damages for the expulsion. *Railroad Co. v. Anderson*, 1.
2. *Idem*—*Exemplary damages*.—Where in such a case the defendant company subsequently ratified conductor's acts, plaintiff is entitled to exemplary damages. *Idem*.
 3. *Idem*—*Measure of damages*.—Amount of defendant company's liability must depend on the circumstances, and be left largely to discretion of the jury, whose verdict will not be disturbed unless it evinces passion, prejudice, or corruption. *Idem*.
 4. *Breach—Verdict—Evidence*.—Defendant agreed to pay plaintiff \$200 if he procured Spanish cigarette paper put up in reels suitable for use in defendant's machine and to buy 1,000 reels from plaintiff. He procured a sample reel of the paper, which defendant approved and ordered 500 reels like it. These plaintiff procured. Defendant refused to take them, claiming they were not like the sample. After some delay he paid the \$200. At trial of action for price of the 500 reels an expert testified that these reels were exactly like the sample. Verdict was for plaintiff: *held*, the verdict could not be disturbed. *Woodrum v. Goss*, 60.
 5. *Municipal corporations—Delegation of authority*.—City council cannot delegate to a committee its authority to sell the city's real estate. *Beel v. City of Roanoke*, 77.
 6. *Idem*—*Pursuance of authority*.—Where council referred petition for purchase of such estate to "the sewer committee and the city solicitor with power to act," such committee cannot bind the city by a contract to sell without the solicitor's concurrence. *Idem*.
 7. *Specific performance—Relief conformable to bill*.—Where the bill alleges contract with defendant to sell plaintiff real estate in fee, and the proof is of a contract for "the right to erect a building on it:" *held*, specific performance cannot be decreed. *Idem*.
 8. *Options—Want of mutuality—Specific performance*.—A court of equity in this State will not decree specific execution of a contract where there is no mutuality both of obligation and remedy, as both parties must, by the contract itself, have a right to compel specific execution. *Wood v. Dickey*, 160.
 9. *Idem*.—Vendor sold to vendee by a title bond (containing no stipulation for a resale) a certain lot of land, agreeing to make vendee a deed thereto free from all incumbrances with general warranty when the last payment of the purchase money was made. When that payment became due vendee made it, and demanded such a deed as he was entitled to under said instrument, which vendor executed

CONTRACTS—*Continued.*

- and delivered to him, but demanded and received from vendee a sealed obligation to build a house thereon within two years, and in the event of failing to build the house to sell back to vendor, at what he paid with interest, said lot except the ground whereon a warehouse then stood. The house was not built within the period specified, and vendor tendered the amount paid with interest to vendee and demanded conveyance. Vendee refused to accept the money and to make the conveyance. Thereupon vendor filed his bill for specific performance. Circuit court overruled the demurrer to the bill and decreed specific performance: *held*, the title bond is a complete contract in itself, and can alone be looked to for the conditions of the sale; and the demurrer should have been sustained for want of mutuality in the contract for resale and the bill dismissed. *Idem*.
10. *Parol evidence*.—Plaintiff by writing agreed to furnish defendant with railroad ties at points where needed, but alleged a contemporaneous parol agreement of defendant to haul part of the ties. In action for defendant's failure to perform the parol agreement: *held*, such agreement could not be proved as it would violate the rule which forbids the admission of parol evidence to vary a written agreement. *Scott v. Railroad Co.*, 241.
 11. *Receipt—Release*.—Plaintiff accepted payment and receipted in full of all demands under the contract for such ties as he hauled: *held*, such receipt was a complete defence to the plaintiff's action. *Idem*.
 12. *Rescission—Fraud—Evidence*.—Vendor sued to rescind sale of land on the ground that vendee misrepresented his ability to pay. Vendor was informed that vendee expected certain money. After the sale, but before vendee was put into possession, he told the former he was disappointed in his expectation. The cash payment was made, but not so the deferred payments. The vendor knowing the vendee's disappointment, sought to enforce the contract. There was no evidence of fraudulent representations, though present insolvency was proved: *held*, vendor was not entitled to rescind the sale, his remedy being to ask for specific performance and sale of the land. *Chase v. Miller*, 323.
 13. *Insurance—New policy*.—Assured asked company's agent to permit removal of insured property. Agent said there were so many endorsements on old policy it would be best to cancel it and take a new one for the return premium at *pro rata* rates. Company issued a new policy expiring at an earlier day, but it was not delivered to assured. The property was burned after expiration of the new, but before that of the old policy: *held*, the company is liable for the loss. *Hardin v. Alexandria Ins. Co.*, 413.
 14. *Agents*.—Insurance company supplies one with all needful blanks, responds to his acts, approves of his permits to remove insured prop-

CONTRACTS—*Continued.*

- erty, and pays the rent of his office: *held*, it is bound by his doings as its agent. *Idem.*
15. *Specific performance—How granted.*—If equity grants specific performance of a contract, it should do so of the contract as the parties made it. *Rison v. Newberry*, 513.
 16. *Idem—When denied—Remedy.*—Where, without good excuse, for a considerable time, vendor of land refuses to perform the contract on his own part, he cannot, after prices have declined, have a decree for specific performance, but must be left to his remedy at law. *Idem.*
 17. *Rescission—When denied—Remedy.*—Where there was no mutual mistake, no illegality, no disability, no fraud by false representations or wilful suppression of such facts as to the subject matter as the party is bound to disclose, and no undue influence resulting from confidence or friendship, equity will not decree a rescission of a contract, but will leave the plaintiff to his remedy at law. *Idem.*
 18. *Construction—Fraud.*—A stipulation in a contract to construct a portion of a railway, making the estimates and certificates of the company's engineer as to the amounts due thereunder binding and conclusive on the parties in the absence of fraud: *held*, not to make such estimates and certificates conclusive on the contractor, where made in such plain violation of the terms and prices specified in the contract as to amount to a fraud, or a mistake so gross as necessarily to imply fraud, or bad faith, especially where the contract also provides for a final estimate of the quality, character, and value of the work according to the contract. *Mills & Fairfax v. Railroad Co.*, 523.
 19. *Releases—Failure—Excuses.*—The failure or neglect of a contractor for the construction of a portion of a railway, to give, or tender to the railway company, releases from claims or demands of mechanics and material men, or others, as required by the contract: *held*, excused where the estimates of the company's engineer, upon which the payments are to be based, are incorrect and fraudulent, because not within the terms of the contract, especially where all the persons having any claims have been fully paid and the time has expired within which they could assert any demands against the company, or file any liens on its property. *Idem.*
 20. *Action on Contract—Declaration.*—Where declaration in an action on such a contract, having set forth the same, alleges performance and acceptance of the work required thereby, and the refusal of the company to pay therefor, except on the estimates and certificates of its engineer made so plainly in violation of the terms and prices specified in the contract, as to amount to fraud: *held*, the declaration is sufficient in law. *Idem.*
 21. *Corporations—Subscription—Fraud.*—Where one is fraudulently in-

CONTRACTS—Continued.

- duced by an agent or promoter of a corporation to subscribe to its capital stock : *held*, he may repudiate the contract at his discretion. *Virginia Land Co. v. Haupt*, 533.
22. *Idem*.—Where such promoter induced defendant, in ignorance of the fact that the former had an option on the land which the corporation was formed to purchase, and in reliance on the former's supposed disinterested and superior judgment, to subscribe to the capital stock, and the defendant was thereby misled to his injury into making a contract which otherwise he would not have made : *held*, the defendant is not bound by his subscription. *Idem*.
23. *Idem*—*Waiver*.—Nor does such defendant waive his right to annul his said subscription by giving to said promoter a proxy to represent him in the first stockholders' meeting, when the facts as to the promoter's option on said land was disclosed, as defendant should not be affected by notice to the promoter of what the latter knew from the beginning and did not disclose to him. *Idem*.
24. *Idem*—*Laches*.—*Laches* does not begin to run until subscriber is chargeable with notice that a fraud has been perpetrated upon him. *Idem*.
25. *Idem*—*Notice*—*What is*—*Duty to investigate*.—Mere suspicious or random statements heard in public, or in stockholders' meetings, do not necessarily constitute notice. But after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once. *Idem*.
26. *Idem*—*Burden of proof*.—Corporation has the burden of proof in asserting that the subscriber had notice and was guilty of *laches*. *Idem*.
27. *Sales*—*Warranty in catalogue*—*Breach*—*Damages*.—Where defendant is induced to buy wagons by warranty in plaintiff's catalogue, that they were well made of good, thoroughly-seasoned material, and strong enough to carry the weight mentioned in catalogue : *held*, that he is entitled to rely thereon and to recover damages for any breach thereof, though his order was on plaintiff's form covenanting that if any breakage occurred within a year from defective material or workmanship, the same should be repaired without cost on production at the factory of the broken or defective parts, and though such parts were not produced there. *Milburn Wagon Co. v. Nisewarner*, 714.
28. *Wills*—*Specific enforcement*—*Oral agreement*.—An oral agreement between two sisters to make mutual wills cannot be specifically enforced after the death of one of them on the ground of part performance, where there has been no further performance than the making and preserving of the wills and the will of the decedent has been revoked by her marriage after its execution. *Hale v. Hale*, 728.

CONTRACTS—*Continued.*

29. *Idem*—*Contract to make—Statute of fraud.*—One may by a certain and definite contract, bind himself to dispose of his estate by will in a particular way, and such contract in a proper case will be specifically enforced in equity. But such contract in respect to real estate is within the statute of frauds. The memorandum in writing required by that statute must contain all the essential elements of the contract (except the consideration), without recourse to parol proof. *Idem.*
30. *Idem.*—The requirement of § 2840 is not satisfied where (as in the case here) the only memorandum is one of two mutual wills, neither referring to the other or to any other writing. *Idem.*
31. *Part performance—What is.*—Acts of part performance to take a parol contract out of the statute of frauds, must be of such unequivocal nature as of themselves to be evidence of the existence of an agreement; as for example, where, under parol agreement to sell land, the purchaser is put in possession, and makes improvements. *Idem.*
32. *Executory contract.*—Deed defectively acknowledged may not pass the legal title, but may be enforceable in equity as an executory contract, and will uphold a trust deed made on faith of it, especially where the one as to whom it is defective makes no objection on that account and is ready to carry out her part of the contract and receive the money intended to be secured to her by the trust deed. *Clinch River Veneer Co. v. Kurth*, 737.
33. *Equitable relief—Breach of contract.*—A claim for damages for a breach of contract to do some collateral thing, is not a fit subject for the jurisdiction of a court of equity. *Wütz, Beidler & Co. v. Mullin's Per. Rep.*, 805.
34. *Idem—Trust deed—Remedy.*—Where suit is brought to enforce a deed of trust whereby are secured "all the debts and liabilities of certain firms and of the individuals composing them": *held*, no claim merely sounding in damages for breach of contract to deliver shares of stock, ought to be taken cognizance of by a court of equity, but the claimants should be left to their remedy at law. *Idem.*
35. *Cases compared.*—*Nagle v. Newton*, 22 Gratt., 814, and *Campbell v. Rust*, 80 Va., 653, compared with and distinguished from the case at bar. *Idem.*
36. *Evidence.*—One may contract to make a provision for another by will; but the evidence must be clear and convincing. *Swann, Ex'or v. Housman*, 816.
37. *Witnesses—Competency.*—The widow of the testator *held* incompetent to prove such contract and to establish the debt against the estate of her late husband. *Idem.*
38. *Equitable jurisdiction—Specific performance—Damages.*—Equity may enforce specific performance of a contract to do on plaintiff's prop-

CONTRACTS—*Continued.*

erty definite work, wherein he had a material interest, and there cannot be adequate compensation in damages; and may also, as ancillary, award damages for a breach of the contract. *Grubb v. Starkey*, 831.

CONTINGENT FEES.

Perpetuities.—Two contingent fees by way of remainder may be limited as substitutes or alternatives one for the other, the latter to take effect in case the prior one fails to vest in interest, and is immediately avoided upon the first so vesting, it being limited to vest in interest within a life or lives in being and twenty-one years and ten months thereafter. *Wilker v. Lewis*, 578.

CONTRIBUTORY NEGLIGENCE. (*See Negligence.*)

CORPORATIONS.

1. *Water companies—Powers—Meters.*—The charter of a water company provides that all water rates shall be uniform throughout the city for the same class of service, and designates special charges for hydrants, but also provides that the charge shall not exceed a certain sum per hundred gallons for the amount supplied: *held*, the company may use either the hydrant as a means of charge or any other reliable instrument which will measure the quantity used, and charge some of its customers by the gallon, and at the same time charge others by the hydrant, though it cannot lawfully discriminate between water taxes of the same class. *Exchange & Building Co. v. Roanoke G. & W. Co.*, 83.
2. *Railroad companies—Municipal subscriptions—Conditions precedent.*—City of Bristol is authorized by statute to subscribe and issue its bond for \$25,000 to the S. A. & O. railroad company; provided said statute shall not be in force until the company subscribed a certain sum to a furnace company. The railroad company merely procured a transfer to itself from the V. T. & C. railroad company of \$25,000 of stock in the furnace company; on which stock the S. A. & O. railroad company, being insolvent, did not even pay the assessments: *held*, the subscription of the said sum by the S. A. & O. railroad company to the furnace company was a condition precedent to the issue of the bonds of the city, with which such transfer was no compliance. *Echols v. City of Bristol*, 165.
3. *Director—Acceptance of service of summons.*—Where one is notified of his appointment as a director without declining it, and afterwards receives a summons for the company without remonstrating, *held*, his acceptance may be presumed, and it is no defence for the com-

CORPORATIONS—*Continued.*

- pany that he, in the absence of collusion, failed to deliver the summons. *Railroad Co. v. Brown*, 340.
4. *Subscription—Fraud.*—Where one is fraudulently induced by an agent or promoter of a corporation to subscribe to its capital stock, *held*, he may repudiate the contract at his discretion. *Va. Land Co. v. Haupt*, 533.
 5. *Idem.*—Where such promoter induced defendant, in ignorance of the fact that the former had an option on the land which the corporation was formed to purchase, and in reliance on the former's supposed disinterested and superior judgment, to subscribe to the capital stock, and the defendant was thereby misled to his injury into making a contract which otherwise he would not have made, *held*, the defendant is not bound by his subscription. *Idem.*
 6. *Idem—Waiver.*—Nor does such defendant waive his right to annul his said subscription by giving to said promoter a proxy to represent him in the first stockholders' meeting, when the facts as to the promoter's option on said land was disclosed, as defendant should not be affected by notice to the promoter of what the latter knew from the beginning and did not disclose to him. *Idem.*
 7. *Idem—Laches.*—*Laches* does not begin to run until subscriber is chargeable with notice that a fraud has been perpetrated upon him. *Idem.*
 8. *Idem—Notice—What is—Duty to investigate*—Mere suspicious or random statements heard in public, or in stockholders' meetings, do not necessarily constitute notice. But after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once. *Idem.*
 9. *Idem—Burden of proof.*—Corporation has the burden of proof in asserting that the subscriber had notice and was guilty of *laches*. *Idem.*
 10. *Assessments—Defences—Subscriber—Transferee.*—Though in suit to collect assessments to corporate stock from subscriber, he may set up under Code, § 3299, the defences of failure of consideration, fraud in the procurement of the contract, or any other matter which would entitle him to relief in equity, yet, *held*, those defences are personal to him, and do not pass to the transferee of the stock. *Lewis v. Berryville Land & Imp. Co.*, 693.
 11. *Creditors.*—A deed of trust executed by a corporation will inure ratably to the benefit of *all its then* creditors, except where it is executed to secure a debt contracted or money borrowed at the time of its execution. *Clinch River Veneer Co. v. Kurth*, 737.
 12. *Taxation—Capital stock—Shares—Double taxation.*—The capital stock and the shares of the capital stock are distinct things, the former belonging to the corporation and the latter to individuals. Both may be taxed, and it is not double taxation. *Commonwealth v. Charlottesville P. B. & L. Co.*, 790.

CORPORATIONS—*Continued.*

13. *Idem*—*Construction of statutes—Non-residents.*—Acts 1889-'90, p. 201, § 8, sub-section 2, taxing "capital, including moneys, &c.," and sub-section 3 thereof, taxing "the value of all capital of incorporated joint stock companies not otherwise taxed: *held*, to authorize the taxation of the capital stock of such companies, not otherwise taxed, as well as the shares in the hands of the stockholders of the companies; as the word "capital" in the former sub-section signifies money or other thing invested, including such shares, whilst in the latter it signifies the capital stock paid in to conduct the business; and that the words "capital not otherwise taxed," in the latter, is not confined to the holdings of non-resident or otherwise inaccessible stockholders. *Idem.*
14. *Stock subscriptions—Cancellation—Doctrine.*—Contract to purchase stock, induced by fraudulent representations, is not void, but only voidable at purchaser's option. Where rights of creditors are concerned, he must use reasonable care and vigilance in discovering fraud, and upon its discovery must promptly repudiate the purchase. If after discovering it, he does any act inconsistent with such disaffirmance, he will be held to have waived the fraud. *Weisiger v. Richmond Ice Machine Co.*, 795.

COUPONS.

Taxes—Schools.

(*See State Bonds.*)

COVENANTS.

Modern covenants.—Such covenants, now used in place of ancient warranty, may affect the nature and quality of the thing sold, but are stipulations in the conveyance and not representations to induce the purchase of the thing sold. *Lake v. Tyree*, 719.

CRIMINAL JURISDICTION AND PROCEEDINGS.

1. *Indictment—Sale of liquor—Evidence—New trial.*—Indictment for unlawful sale of ardent spirits, charged that the offence was committed in a certain district where, under the local option law, "no license" prevailed. The evidence was that the defendant sold ardent spirits to witness in the county, but did not designate the district. Defendant moved to set aside the verdict of "guilty as charged in the indictment," and for a new trial; which motion was overruled: *held*, the motion should have been sustained. *Morgan's Case*, 80.
2. *Special grand jury.*—Without a writ of *venire facias* a special grand jury may be summoned from a list furnished by the judge. *Comb's Case*, 88.

CRIMINAL JURISDICTION AND PROCEEDINGS—*Continued.*

3. *Legal session—Special judge.*—A county court is in regular session on the second day of a term on which it is opened by the judge thereof, when an order is made stating that owing to his disability to preside at the trial of any cause on the docket another specified judge took his seat and proceeded to dispatch business, the record stating that the latter judge signed the orders of that day. *Idem.*
4. *Record.*—There need not be set out in the record the writ of *venire facias* for the trial jury in a criminal prosecution. *Idem.*
5. *Criminal proceedings—Indictment.*—Indictment laying the charges of unlawfully selling different kinds of intoxicating liquors in the disjunctive, is sufficient. *Thomas' Case*, 92.
6. *Election under repealed statute—Validity.*—An election held July 1, 1886, under act of February 26, 1886, was not invalidated by repeal of that act after May 1, 1888, by the adoption of Code, § 4202. *Idem.*
7. *Judicial cognizance—Election.*—The court will take notice judicially that an election held under act of February 26, 1886, in the magisterial district wherein the offence is laid, the vote against license prevailed, and no allegation to that effect is necessary in the indictment; and also that apple brandy is intoxicating. *Idem.*
8. *Clerical error.*—A mistake as to the date of an order entered in the record of the county court in relation to such election will not invalidate the election. *Idem.*
9. *Impannelling jury.*—A person summoned as one of a panel of sixteen free from exception, who at the time of selecting the jury is serving on the grand jury, is not "in attendance," in the sense of Code, § 4019; and it is not error to refuse to place him on the panel, or examine him on his *voir dire*. *Short's Case*, 96.
10. *Objections too late.*—In the appellant court objection cannot be made for the first time that a person served on the jury without being selected by the court or summoned by the sheriff. *Idem.*
11. *Homicide—Grand jury—Foreman.*—Objection that grand jury was not constituted, and foreman not selected and sworn, as required by law, cannot be raised for first time in the appellate court, but must be by plea in abatement. *Taylor's Case*, 109.
12. *Venire facias—Record.*—It appearing that the *venire* was issued by order of the trial court, *held*, no error that it is not made part of the record. *Idem.*
13. *Evidence—Previous assault.*—On trial for murder, testimony that about three weeks before the homicide the bed of the deceased was fired into, *held*, admissible, where prisoner several times mentioned the firing in a manner indicating he had done it himself, or procured it to be done. *Idem.*
14. *Idem—Uncommunicated threats.*—Though after the homicide prisoner

CRIMINAL JURISDICTION AND PROCEEDINGS—*Continued.*

- absconded, the exclusion of uncommunicated threats against him, *held*, not error. *Idem.*
15. *Idem*—*Rumor—Flight*.—General talk in the community that if certain persons found prisoner they would kill him without attempting to arrest him: *held*, inadmissible on trial for murder to rebut the fact of his immediate flight and concealment and endeavor to leave the State. *Idem.*
 16. *Idem*—*Indictment against another*.—It is not error to exclude as evidence an indictment against another person for the same offence. *Idem.*
 17. *Verdict—Affidavits of jurors*.—The affidavits or declarations of jurors showing that they acted on evidence other than that adduced before them at the trial, cannot be used to impeach the verdict. *Idem.*
 18. *Misconduct of jury*.—Upon trial for murder, cartridge hulls found at the scene of the homicide have been introduced by the prosecution, and prisoner's Winchester rifle, with shells fired from it during the trial, has been introduced by him to show that the plunger struck the shells differently from those introduced by the prosecution; and the jury were permitted, without objection, to take the rifle and shells to their room: *held*, it was not misconduct in the jury to take it apart and examine the plunger and ascertain that they have been recently tampered with and fixed so as to explode the cartridge differently from those put in evidence by the prosecution. *Idem.*
 19. *Instructions—Reasonable doubt*.—It is not error to strike out the words "to doubt is to acquit," from an instruction where the law of reasonable doubt was given in its most favorable form for the prisoner. *Idem.*
 20. *Idem—Inferences*.—It is not error to refuse to instruct the jury that no inference can be drawn from prisoner's failure to introduce any evidence to show where he was on the day of the homicide, where it is in evidence that he told a witness that he was at that time in another State, as instructions not applicable to the evidence, are inadmissible. *Idem.*
 21. *Continuances*.—For the principles on which continuances are granted in criminal cases see opinion of Lacy, J. *Welch's Case*, 318.
 22. *Idem*—A day before trial a summons was issued and delivered to the sheriff for a witness residing in the same town. The summons was returned "not found." Defendant made affidavit to his materiality and that he could not safely go to trial without him. Trial court overruled the motion for continuance on the sole ground that the statements of the defendant under oath were not to be credited: *held*, error. *Idem.*
 23. *Speedy trial—Continuance*.—Motion for continuance is always within the sound discretion of the court, to be exercised fairly with due

CRIMINAL JURISDICTION AND PROCEEDINGS—*Continued.*

regard to the circumstances and the law enacted pursuant to article 1, section 10, of the constitution, declaring that "in all criminal prosecutions a man hath a right to a speedy trial." *Benton's Case*, 328.

24. *Idem.*—Defendant, in jail since September, 1892, all the time ready for trial, demanded trial on February 15, 1893, his case being set for trial on that day. Commonwealth announced that it had made no preparation for trial on that day, and had recalled processes for witnesses and could offer no evidence at that term. The court then continued the case until March 16th, the day of expiration of sentence of commonwealth's witness, B, who was then in jail for a felony, and incompetent to testify: *held*, such continuance was a reversible error. *Idem.*
25. *Recognizance—Scire facias.*—Condition of recognizance of one accused of a felony was for his personal appearance "to answer the charge against him." The language of the *scire facias* on such recognizance was for his personal appearance "to answer as of a felony whereof he stands accused:" *held*, (1) No form of language being prescribed for a recognizance it is sufficient; (2) the variance between the recognizance and the *scire facias* is immaterial. *Allen's Case*, 356.
26. *Appearance and pleading.*—When recognizance provides that the accused shall appear, &c., and "not depart without the leave of the court:" *held*, no defence to *scire facias* that accused appeared and pleaded "not guilty" when he departed without leave of the court. *Idem.*
27. *Manslaughter—Self-defence.*—Upon the facts in this case as set out in the opinion of the court: *held*, there is no element of self-defence in it, and the verdict of guilty of manslaughter with five years' confinement in the penitentiary, will not be disturbed. *Clark's Case*, 360.
28. *Jury from another county.*—Where a *venire facias* is directed to sheriff of another county to summon a jury, a list need not be furnished him. *Idem.*
29. *Bill of exceptions.*—An entry in the order book that defendant excepted to a certain ruling of the trial court will not supply the place of a bill of exceptions. *Idem.*
30. *Instructions.*—At the trial the court instructs that "if the jury, from the evidence, believe that prisoner wilfully inflicted upon deceased a wound calculated to endanger or destroy life, and that death ensued therefrom within a year and a day, the prisoner is none the less responsible for the result, although it may appear that the deceased might have recovered but for the aggravation of the wound by unskilful or improper treatment:" *held*, no error. *Idem.*
31. *Witnesses.*—Commonwealth need not call all the witnesses present at the homicide or named in the indictment. But the court, of its own

CRIMINAL JURISDICTION AND PROCEEDINGS—*Continued.*

- volition, may call such witnesses for cross-examination by both sides, and they will not be considered as witnesses for either. *Idem.*
32. *Self-defence.*—Where death ensues on sudden provocation or quarrel, without malice aforethought, the killing is manslaughter. To reduce the offence to killing in self-defence the accused must prove two things, to-wit: (1) That before the mortal blow was given he declined further combat, and retreated as far as he could with safety, and (2) that he killed the deceased through the necessity of preserving his life or to save himself from great bodily harm. *Idem.*
33. *Misnomer—Amendment.*—Where defendants indicted jointly for a misdemeanor, have been duly summoned, but failed to appear, the court may, in their absence, amend the indictment against "S. C.," and make it read "S. S. alias S. C." *Shiflett's Case*, 386.
34. *Absence—Imprisonment.*—Upon such indictment: *held*, not error to try defendants in their absence, without first awarding a *capias* for their arrest, nor to enter judgment for their imprisonment in jail (Code, § 4012 and § 4076); nor to order their arrest and imprisonment for non-payment of a fine before a *fieri facias* has been issued. *Idem.*
35. *Rights of accused.*—Such trial and sentence of such defendants in their absence: *held*, not violative of the constitutional guaranty that "the accused in all criminal prosecutions hath a right to be confronted with the witnesses against him." *Idem.*
36. *Continuance.*—After a former conviction set aside on appeal, defendant moved for a continuance for absence of a material witness from sickness, but convalescent and able to attend (in defendant's opinion), at the term to which he moved the case to be continued, though the physician stated there was but little chance of his recovery: *held*, refusal to grant the continuance was a reversible error. *Phillips' Case*, 401.
37. *Indictment.*—An indictment for larceny of "one paper purporting to be a check for \$125 of the value of \$125 of the goods and chattels of one R., then and there being on the person of said R.": *held*, sufficient. *Whalen's Case*, 544.
38. *Rule—Value.*—Code, § 3709, providing that in such a prosecution the money due on, or secured by, the writing, and "remaining unsatisfied," shall be deemed the value of the article stolen: *held*, merely to prescribe a rule for estimating the value of the paper, and not a part of the necessary description of the offence. *Idem.*
39. *Proof of value.*—As the law presumes that the face value of the writing is its actual value: *held*, no proof of its actual value is required. *Idem.*
40. As the case stands on defendant's exception to the ruling of trial court overruling his motion for a new trial, which is equivalent to a de-

CRIMINAL JURISDICTION AND PROCEEDINGS—*Continued.*

- murrer to the evidence, and as the commonwealth is entitled to the benefit of all reasonable inferences that can be drawn from the evidence: *held*, the evidence disclosed by the record and set forth in the opinion is sufficient to warrant the verdict of guilty of grand larceny. *Idem*.
41. *Abandonment*.—Fraudulently taking pocketbook from another's pocket with intent to wholly deprive owner of his property, completes the larceny, though defendant afterwards abandoned it. *Idem*.
 42. *Second trial—Objection delayed—Arrest of judgment*.—Where objection is delayed until after the verdict to sending to jury indictment endorsed with the verdict of guilty found at first trial: *held*, not error, and if error, the remedy is not by motion in arrest of judgment. *Forbes' Case*, 550.
 43. *New trial—Higher offence*.—Conviction of unlawful shooting is a conviction of a felony, though punished by imprisonment in jail and fine, and after reversal of the sentence, a second trial may be had for the felony and not merely for a misdemeanor, notwithstanding Code, § 4040. *Idem*.
 44. *Presence of accused*.—It is the well established practice in this State that a prisoner accused of felony must be arraigned and plead and appear in person in all the subsequent proceedings, and the fact of such attendance must appear upon the record. *Coleman's Case*, 635.
 45. *Homicide—Witness*.—Where on trial of one of two persons jointly indicted for murder and electing to be tried separately, the commonwealth declines to call the other defendant as its witness, and at the suggestion of prisoner's attorney, the court calls him, and he is examined first by the court, then by commonwealth's attorney, and lastly by prisoner's attorney: *held*, no error. *Brown's Case*, 671.
 46. *Conduct of jury—Absence of accused*.—A mere casual visit to scene of homicide by jury during recess whilst taking exercise under custody of officer in charge, in prisoner's absence, when there is no proof of prejudice, or of conversation regarding the scene, or of any influence on the jury thereby: *held*, no ground for setting aside the verdict. *Idem*.
 47. *Exclusion of witness*.—Where after order of trial court that the witnesses be examined out of the hearing of each other, one not summoned, but present as a spectator, has heard part of the evidence, was called as witness for commonwealth: *held*, no ground for his exclusion. *Idem*.
 48. *Evidence of another offence*.—Where on trial for murder prisoner had been, without objection, proven to have confessed that on night of homicide certain goods had been stolen, and a witness was allowed to testify that those goods were found in prisoner's house when he

CRIMINAL JURISDICTION AND PROCEEDINGS—*Continued.*

- was arrested for the homicide: *held*, as prisoner was not prejudiced by the testimony, its admission, though irregular, was not a reversible error. *Idem.*
49. *Evidence at examination.*—Where notes of evidence at prisoner's examination before the magistrate were taken by private stenographer of commonwealth's attorney at his own expense and for his own use: *held*, prisoner has no right to have those notes. *Idem.*
50. *Malice aforethought—Instructions.*—To constitute murder, the killing must be predetermined, yet the design to kill need not have existed for any particular length of time and may be formed at the moment of committing the act, and an instruction on a murder trial, that it is not necessary that the design of killing should have existed "for any length of time": *held*, not misleading as being equivalent to telling the jury that a killing on sudden impulse is murder. *Idem.*
51. *Deadly Weapons.*—Malice may be presumed from the use of a deadly weapon in the previous possession of the slayer. *Idem.*
52. *Principal in second degree.*—An accused may be guilty of murder in the second degree, though the fatal shot was fired by another, if the latter was engaged jointly with accused in a felonious act and fired the shot in attempting to accomplish their joint escape, the accused being present aiding and abetting the one who fired it. *Idem.*
53. *New trial—Bill of Exceptions.*—Where neither the facts nor the evidence is certified in the record, this court cannot review a decision of the trial court overruling a motion for a new trial. *Idem.*
54. *Continuance.*—At a murder trial the motion of accused for a continuance on the ground that an absent person, who had not been summoned, would, it was rumored, testify that one of the commonwealth's numerous witnesses present at the homicide, was an convict, was overruled: *held*, no error. *Myers' Case*, 705.
55. *Homicide—Burden of proof.*—A homicide is presumed by the law to be murder in the second degree, and if accused would lower the crime below that grade, the burden of proof is on him. *Idem.*
56. *Venire facias.*—A *venire facias* is an indispensable process to authorize sheriff to summon a jury in a felony case, though the writ itself is not a part of the record unless made so by bill of exceptions or otherwise; nor does failure to object in the trial court to the want of such process waive the right of objection in this court. *Meyers' Case*, 785.
57. *Subsequent legislation.*—Nor is the rule altered as to this case by Acts 1893-4, p. 494, amending Code, § 3156, as the amendment was not intended to be retrospective in its action, statutes being always to be construed to operate in *futuro*, unless a retrospective effect be clearly intended. *Idem.*
58. *Joinder of offences.*—Where several articles are stolen at one time and

CRIMINAL JURISDICTION AND PROCEEDINGS—*Continued.*

- place, the stealing is regarded as one transaction and may be charged in a single count, though the articles belong to different persons. *Alexander's Case*, 809.
59. *Not a felony*.—Where at the trial of an indictment for larceny the evidence shows that the aggregate value of the property stolen was less than fifty dollars, a conviction for a felony is erroneous. *Idem*.
60. *Seduction—Evidence*.—At trial for felonious seduction : *held*, the character of the house—whether of ill or good repute—where prosecutrix resided prior to her alleged seduction, may be proved by evidence of particular facts, not the conclusions of the witness, and not by general reputation. *Barker's Case*, 820.
61. *Compromise—Instructions*.—At such trial the jury were instructed that no compromise between the parties, or any one else, could bar the prosecution : *held*, no error ; nor is an instruction in the language of the statute, Code, § 3677. *Idem*.
62. *Duty of jury—Instruction*.—It being no more the duty of the jury to endeavor to acquit than to convict, an instruction that the jury should endeavor to reconcile all the evidence with the presumption of the innocence of the accused : *held*, properly denied. *Idem*.
63. *Chastity—Burden of proof*.—In a prosecution for felonious seduction, the chastity of the prosecutrix is presumed by the law, and the burden of impeaching it lies on the accused. *Idem*.
64. *Venire facias*.—The jury for the trial of a felony must be brought in under a writ of *venire facias*, and the failure of the record to show that fact : *held*, reversible error. *Idem*.
65. *Quare* as to the extent to which the testimony of the prosecutrix must be supported by other evidence under Code, § 3679, in order to sustain conviction of accused. *Idem*.
66. *Selling liquor—Code, § 534*.—Under said section a single sale of liquor without a license is a violation, as the law is not limited to persons engaged in carrying on the traffic. *Lewis' Case*, 843.
67. *Idem—Joinder of offences*.—The indictment in this case contains ten counts, each charging a sale to a different person, which constitutes separate and distinct offences : *held*, the demurrer was properly overruled. *Idem*.
68. *Instructions—Evidence*.—Where there is no evidence tending to support an instruction that is asked for : *held*, it is properly denied. *Idem*.

CROSSINGS. (*See Railroads.*)

CURRENCY.

City council—Notes as currency.—Under an ordinance in 1861, city of Richmond issued notes to circulate as currency. Evidence showed

CURRENCY—*Continued.*

that one object was to aid the rebellion : *held*, the notes were void. *Isaacs, &c., v. City of Richmond*, 30.

DAMAGES.

1. *Carriers—Construction of contract—Ejection of passenger.*—Ticket provided that when presented to conductor, passenger should sign his name thereto, and "otherwise identify" himself as original purchaser thereof. Passenger offered to sign ticket, which offer conductor refused, and ejected him from train for refusing to pay fare : *held*, conductor not entitled to require passenger to "otherwise identify" himself, and defendant company was liable in damages for the expulsion. *Railroad Co. v. Anderson*, 1.
2. *Idem—Exemplary damages.*—Where in such a case the defendant company subsequently ratified conductor's acts, plaintiff is entitled to exemplary damages. *Idem*.
3. *Idem—Measure of damages.*—Amount of defendant company's liability must depend on the circumstances, and be left largely to discretion of the jury, whose verdict will not be disturbed unless it evinces passion, prejudice, or corruption. *Idem*.
4. *Excessive—New trial.*—Verdict for \$1,600 for damages caused by fires set from locomotive will not be set aside as excessive where witnesses who examined the damage estimated it as more than twice that amount. *Railroad Co. v. Draper*, 245.
5. *Verdict.*—A verdict of \$2,500 for an injury to an employee—breaking his skull so that a part has to be removed, leaving the brain unprotected—by which his capacity to work is very much impaired : *held*, not excessive. *Richlands Iron Co. v. Elkins*, 249.

DECEDENTS' DEBTS.

Personalty—Realty.—The personal estate being the primary fund for paying decedent's debts, it will not be exonerated by a charge on the realty, without plain intent to that effect. *Swann, Ex'or v. Housman*, 816.

DEEDS.

1. *Construction.*—Two deeds embracing same subject matter, between same parties and relating only to same transaction, the latter executed to correct a mistake and supply an omission in the earlier, should be construed together as one deed. *King v. Railroad Co.*, 210.
2. *Description.*—Boundary lines of lands conveyed to a railroad company should stand as fixed by the deeds, and not be shifted to meet any change of the track found necessary or desirable. *Idem*.

DEEDS—Continued.

3. *Adverse possession*.—Railroad company's right of way to land conveyed to it under agreement with grantor that he might use any portion of it not needed by the company, he to yield possession whenever it should be needed by the company, is not affected by its being unenclosed, vacant of buildings, or unoccupied at any time. *Idem*.
4. *Construction—After born child*.—Conveyance of land to "the lawful heirs of J. and R.," who were then living and had three children, and a fourth child was born to them after date of deed: *held*, the deed gave a fee in remainder to three children to be opened for the fourth child when born. *Buford v. North Roanoke L. & I. Co.*, 418.
5. *Modern covenants*.—Such covenants, now used in place of ancient warranty, may affect the nature and quality of the thing sold, but are stipulations in the conveyance and not representations to induce the purchase of the thing sold. *Lake v. Tyree*, 719.
6. *Deed of married women—Defective acknowledgment*.—Where certificate of acknowledgment to deed of a married woman in 1887, failed to state that she acknowledged the same to be her act, and that she willingly executed it: *held*, the deed is void. *Clinch River Veneer Co. v. Kurst*, 737.
7. *Idem—Executory contract*.—Deed defectively acknowledged may not pass the legal title, but may be enforceable in equity as an executory contract, and will uphold a trust deed made on faith of it, especially where the one as to whom it is defective, makes no objection on that account and is ready to carry out her part of the contract and receive the money intended to be secured to her by the trust deed. *Idem*.
8. *Description of land*.—A description consisting only of the words, "A piece of land near Bacon Quarter branch," *held*, too vague and indefinite to create a right of property in any particular parcel of land. *George v. Bates*, 839.

DEEDS OF TRUST.

1. *Married women—Separate estate*.—A deed of trust executed by a married woman and her trustee on her equitable separate estate in land, her husband not joining in the deed, is void. *Taylor v. Cussen*, 40.
2. *Idem—Rents and profits*.—Such trust deed is not an incumbrance on the rents and profits of such estate where it does not appear that the loan secured by the deed was for her benefit, and where her intention was to create a *specific lien* on the estate. *Idem*.
3. *Husband—Estoppel*.—Where husband was not guilty of any fraud, actual or constructive, in negotiating the loan, he is not estopped from denying the validity of such deed. *Idem*.
4. *Notice of sale—Equity jurisdiction*.—Where a court of equity has taken

DEEDS OF TRUST—*Continued.*

- charge of the execution of a trust, it should prescribe a reasonable notice of at least thirty days for sale of the trust property, notwithstanding the fact that the deed required "ten days at the least." *Morriss v. Va. State Ins. Co.*, 370.
5. *Idem*—Place of sale.—Where sale shall be made lies in the trustee's discretion in case the deed does not name the place; but if either party disapproves his decision, he should, before the sale, apply to the court for instructions. *Idem*.
 6. *Idem*.—Where property on outskirts of Richmond was to be sold under a trust deed naming no place of sale, trustee selected the city hall, to which the debtor objected, that it would sell higher on the premises: *held*, the debtor's wishes should govern. *Idem*.
 7. *Sale in parcels*—*Injunction*.—Deed not prescribing sale by parcels must be construed by the statute requiring, in case of default, the trustee "to sell the property conveyed by the deed, or so much thereof as may be necessary." *Held*, if it will sell higher by parcels, and the owner requests such sale, and trustee refuses, a court of equity will intervene. *Idem*.
 8. *Personal confidence*.—The trustee must act in person, and not by agent. *Idem*.
 9. *Subjects of*.—Debtor may convey for his creditor's benefit property held by him nominally in trust for others, but equitably his own, and withhold property nominally his own, but equitably belonging to others. *Brown v. Putney*, 447.
 10. *Idem*.—In 1884 B. procured a decree for exchange of his own lot for a lot held by a trustee for his wife and children by proceedings not in accordance with the law. Later, by a trust deed reciting the invalidity of the exchange, he conveyed the former lot for his creditor's benefit and the latter lot for his wife and children's benefit. His creditors filed their bill, alleging the exchange to have been valid, and attacking the trust deed as voluntary and fraudulent. The court below overruled the demurrer to the bill and adjudged the trust deed void: *held*, error. *Idem*.
 11. *Chattel mortgages*—*Lex loci contractus*.—A trust deed of chattels, valid and recorded in another State, is valid in this State, though not recorded here. *Craig v. Williams*, 500.
 12. *Acknowledgment before trustee*.—A deed of trust acknowledged for recordation by the grantor before the trustee is void. *Clinch River Veneer Co. v. Kurth*, 735.
 13. *Corporation*—*Creditors*.—A deed of trust executed by a corporation will inure ratably to the benefit of *all its then* creditors except where it is executed to secure a debt contracted or money borrowed at the time of its execution. *Idem*.

DELINQUENT TAXES.

1. *Sales for taxes—Ex-collector.*—Where power to sell land for taxes is given by a city charter to the city collector: *held*, such power ceases with his official term and a sale made by him after cessation of his term, is void. *McCullough v. Hunter*, 699.
2. *Mandamus—Treasurer—Deed.*—Where sale of land for taxes is made by an ex-collector, *mandamus* will not lie to compel the city treasurer to make a deed conveying the land to the purchaser. *Idem*.

DEMURRAGE.

1. *Carriers—Detention of cars.*—A railroad company may make a reasonable charge for delay in unloading cars after notice of arrival to the consignee, and such charge is not for transportation, storage or delivery of freight within Code, §§ 1202, 1203, which declare that no charge other than that provided by law shall be made. *Railroad Co. v. Adams*, 393.
2. *Idem.*—A charge to a consignee of one dollar a day after three days for every car remaining unloaded after notice of arrival, *held*, not unreasonable. *Idem*.

DEMURRER TO EVIDENCE.

1. *Joinder in.*—Where it would be the duty of the trial court to set aside a verdict in favor of the defendants, *held*, defendants may properly be compelled to join in a demurrer to the evidence. *Deaton v. T aylor*, 219.
2. *Appellate practice.*—This court will consider an assignment of error in the court below overruling motion for a new trial in the light of a demurrer to evidence, when not the facts but the evidence is certified. *Smith's Case*, 759.

DEPOSITIONS.

Notice.—Where defendant had been notified by plaintiff's attorneys in this suit of their intention to take depositions in the State of Georgia in another suit wherein the plaintiff was not interested, on the same day that depositions were taken in this suit in the city of New York, *held*, the defendant's motion to suppress the depositions taken in this suit was properly overruled. *Wytheville Ins. & Banking Co., v. Tieger*, 277.

DIVORCE.

1. *Cruelly.*—In a wife's suit for divorce *a mensa et thoro* for cruelty, it was proved that habitually defendant annoyed and mortified her, was often drunk and abused and struck her, came into her room at

DIVORCE—*Continued.*

- night with sword and pistol threatening to kill her, and finally drove her and her three-year-old child from the house at night, and that she was very delicate and nervous : *held*, she was entitled to the relief asked for. *Kinsey v. Kinsey*, 16.
2. *Divorce a mensa et thoro*.—On the facts set forth in this court's statement a decree for a divorce from bed and board and the custody of her children : *held*, properly granted to the wife. *Heninger v. Heninger*, 271.
 3. *Alimony—Rule*.—The general rule is that the husband's income is the fund from which allowance for alimony is allowed. *Idem*.
 4. *Idem—Education of children*.—Where husband's estate consists of unimproved land, the net income of which is not clearly shown, *held*, that a decree which requires the husband to provide for his wife and five infant children a permanent home and \$1,000 a year for alimony and the support and education of the children, will not be affirmed, though the jurisdiction of the court to provide for the education of the children is unquestionable. *Idem*.

EASEMENTS.

1. *Highways*.—No easement in land which has been established as a public road can be acquired by subsequent arbitration proceedings between the original owner and the mover of the proceedings to establish such a road, to which the public is no party. *Railroad Co. v. Rasmake*, 170.
2. *Injury to highway—Suit for damages*.—On R.'s motion the county court established a public road through B.'s land. B. appealed. By consent the appeal was dismissed. The circuit court, at a later term, made an order referring the question of the road and damages to arbitration. The award was entered up, at a term still later, as the order of the circuit court. Afterwards a railway company injured the roadway, and R., claiming he had acquired an easement therein by virtue of said order, sued said company for damages for the injury : *held*, (1) The dismissal of the appeal ended the jurisdiction of the circuit court over the case. (2) The award entered as the judgment of that court, even had it had jurisdiction, could not confer on R. any right in the road, which was a public highway. (3) R. had no cause of action for the injury against the company. *Idem*.

EJECTMENT.

1. *Title of plaintiff*.—In order to recover the land sued for in ejectment, a good and sufficient title thereto must be shown in the plaintiff, who cannot recover on the defect of title in the defendant in possession. *McKinney v. Daniel*, 702.

EJECTMENT—Continued.

2. *Verdict—Alteration.*—In action of ejectment jury found verdict for plaintiff for all the land claimed in his declaration. Judgment was entered thereon and the jury discharged. Defendant moved for a new trial. The court entered an order declaring it would grant a new trial unless plaintiff abated the verdict and took judgment for part of the land. Plaintiff abated as required: *held*, the court had no power to make the order. *Shiflet v. Dowell*, 745.
3. *Statutory provision.*—In suits for money it is the practice of the trial courts to put plaintiff on terms to abate merely excessive amounts found by the jury, but not so in ejectment because of Code, § 2746, prescribing what the verdict for land shall be. *Idem*.
4. *Evidence—Exceptions.*—In such action plaintiff must establish in himself a legal title to the possession of the premises, and defendant may confine his evidence to disproving plaintiff's pretensions, except that where defendant entered under plaintiff as tenant, &c., he cannot set up title in a third person. *Voight v. Ruby*, 799.
5. *Idem.*—The evidence here: *held*, as showing not only no title in plaintiff to the premises in controversy, but also that a survey of the boundaries of said premises made many years previous by the county surveyor, as the property of a third party, plaintiff was present and acquiesced. *Idem*.

ELECTION.

1. *Election under repealed statute—Validity.*—An election held July 1, 1886, under act of February 26, 1886, was not invalidated by repeal of that act after May 1, 1888, by the adoption of Code, § 4202. *Thomas' Case*, 92.
2. *Judicial cognizance.*—The court will take notice judicially that at an election held under act of February 26, 1886, in the magisterial district wherein the offence is laid, the vote against license prevailed, and no allegation to that effect is necessary in the indictment; and also that apple brandy is intoxicating. *Idem*.
3. *Clerical error.*—A mistake as to the date of an order entered in the record of the county court in relation to such election will not invalidate the election. *Idem*.

EMPLOYER AND EMPLOYEE.

1. *Employees—Risks—Instructions.*—In action by employee for personal injuries, it is not error to instruct that a servant entering upon dangerous employment assumes all incident risks, but not extraordinary risks arising from defective machinery, unless he has knowledge thereof, and chooses to remain in the employment. *Richlands Iron Co. v. Elkins*, 249.

EMPLOYER AND EMPLOYEE—*Continued.*

2. *Idem*—*Duty of employer.*—Nor is it error to instruct that it is employer's duty to use ordinary care to provide reasonably safe and suitable machinery, and that in absence of notice to the contrary, employee is warranted in assuming that employer has performed his duty in so providing. *Idem.*
3. *Employer—Defective machinery.*—Where employer leaves a large rapidly revolving cogwheel unprotected, so that tongs carrying large masses of iron are liable to be caught and taken into it and the pieces thrown all about the room with such force as to kill any person with whom they come in contact, after having been warned by a skilled workman to encase it, such employer *held* liable for an injury to an employee resulting from the tongs catching in the cogs. *Idem.*
4. *Verdict—Damages.*—A verdict of \$2,500 for an injury to an employee—breaking his skull so that a part has to be removed, leaving the brain unprotected—by which his capacity to work is very much impaired: *held*, not excessive. *Idem.*
5. *Employees—Injuries—Contributory negligence—Disobedience.*—Where, contrary to rules, conductor allowed cars to be shifted and run down grade without an engine to control them, and whilst he was between the cars, a brakeman, without objection from the conductor, caused another car to run down the same way, which, by reason of defective brakes, could not be controlled, and struck the first-named cars with such violence that the conductor was injured: *held*, the conductor cannot recover on account of his own negligence and disobedience of the rules. *Railroad Co. v. Dudley*, 304.
6. *Idem—Presumption.*—Railroad companies are entitled to presume that cars delivered to them by connecting companies are in proper condition. *Idem.*
7. *Idem—Failure to inspect.*—Conductors who are required by the rules to inspect all cars picked up in transit, cannot recover for injuries received by them by reason of their failure to inspect such cars. *Idem.*
8. *Risks—Other perils—Warning.*—An employee's assumption of the hazards of his employment, does not extend to the hazards of a work of a different character to which his employer temporarily orders him. And in such case, he is entitled to rely on his employer's giving him proper warning of other perils unknown to him, and from which said work necessarily distracts his attention. *Michael v. Romaine Machine Works*, 492.
9. *Negligent injuries.*—One, employed as a helper in defendant's boiler shop, was ordered to do a novel and engrossing work—that of emptying certain oil pans; and whilst sitting on a wall twenty-five feet high with his legs hanging over its side, and reaching down two

EMPLOYER AND EMPLOYEE—*Continued.*

and a half feet to empty the pans with his left hand, he had to hang for support, his right arm across an iron rail on top of the wall, on which moved on flanged wheels a huge crane propelled by an engine. When he started to do the work, the crane was stationary. He had to sit with his back to the crane, and was engrossed with emptying the third pan when the crane was set in motion, without warning to him, and passing over his right arm, crushed it. On demurrer to the evidence at trial of action for damages, *held*, the defendant company is liable, the injury being the result of its negligence, without contributory negligence on the plaintiff's part. *Idem.*

10. *Railroads—Negligence of superior.*—A railroad company *held* liable for an injury to an engine hostler caused by the negligence of his superior, the yardmaster, in sending him forward with the engine on a track upon which the yardmaster, had thrown some box-cars in charge of a brakeman, although the negligence of such brakeman (his fellow servant) in bringing the cars too close to a switch on which such hostler is directed by his said superior to take the engine, contributed to the injury. *Railroad Co. v. Phelps*, 665.
11. *Employees—Contributory negligence—Obedience to orders.*—Where employee acts in obedience to orders he cannot be deemed guilty of contributory negligence, unless the danger be so glaring that no prudent man would encounter it, even when, like the employee, he was not entirely free to choose. *Railroad Co. v. Ward*, 687.
12. *Idem—Increased dangers—Liability of employers.*—Defendant had plaintiff employed in making excavations that demanded much caution. "Ground-log-holes" were dug eighteen inches wide and thirteen feet deep instead of six or eight feet deep as usual, with sides unsupported. "Boss," without examining as to the safety of the work, ordered plaintiff, who was unaware of the increased dangers thereof, to go in and dig the hole deeper. The sides caved in and disabled plaintiff for life: *held*, defendant is liable. *Idem.*
13. *Idem—Knowledge of danger—Burden of proof.*—The burden rests upon employer to prove that employee was aware of the increased dangers growing out of employer's negligence, and not out of the dangers incident to his ordinary employment. *Idem.*

ESTATES TAIL.

1. *Wills—Construction—"Son."*—The word "son," in its technical sense, is a word of purchase, and must be so construed, unless in the context there is something to the contrary. Nor since the act abolishing entails can a testator be presumed to intend to create an estate tail unless he uses such words as created such estate without implication. *Walker v. Lewis*, 578.

ESTATES TAIL—*Continued.*

2. *Idem—Shelley's Case.*—A devise of lands to one for life, and after his death to his sons and their heirs forever, to be equally divided among them, but in case of his dying without leaving a son or son's son who can take, then to other designated persons, does not under the rule in *Shelley's Case* create a fee tail in the first devisee, which becomes converted by statute into a fee simple. *Idem.*

ESTOPPEL.

1. *Husband.*—Where husband was not guilty of any fraud, actual or constructive, in negotiating a loan on wife's separate estate, he is not estopped from denying the validity of such deed. *Taylor v. Cussen*, 40.
2. *Resulting trusts—Married women.*—A married woman is not estopped from claiming as against her husband's creditors, a resulting trust in land paid for by her father and intended to be hers, but deeded to her husband by his collusion with the grantor, by reason of the failure of her father and herself to take positive action during his lifetime, if she did not then know how the title stood, nor what her father's intentions were, and did assert her title before it was assailed. *Steagall v. Steagall*, 73.
3. *Insurance—Apparent agent.*—When insurance company clothes a person with apparent authority to deliver policies and receive premiums: held, it is estopped, after policy is delivered to innocent holder, to set up a defence that the agent acted without written authority. *Wytheville Ins. & Banking Co. v. Teiger*, 277.
4. *Mistake of law.*—The mistaken view of a testatrix that her marriage subsequent to the execution of her will, was not a revocation thereof, does not estop her heirs from claiming that the will was revoked under Code, § 2517. *Hale v. Hale*, 728.

EQUITABLE JURISDICTION AND RELIEF.

1. *Water courses—Milldam owners—Injunction.*—Owner of dam in stream of water cannot enjoin prior owner of dam above his from damming back the water for purpose of raising a pond sufficient to supply his mill with water for operating his machinery, although such use at times keeps back the water to the extent of depriving the lower owner of water. *Mumpower v. City of Bristol*, 151.
2. *Judgments—Remedy at law—Injunction.*—An injunction will not be awarded to a judgment by default upon summons directed to sheriff of another county than the one where the action is brought, although the summons was issued contrary to law, as the judgment, though erroneous, is not void, and the defendant has a complete remedy at law by motion under Code, § 3451. *Brown v. Chapman*, 174.

EQUITABLE JURISDICTION AND RELIEF—*Continued.*

3. *Cancellation of satisfaction of judgment—Attorneys.*—A suit to cancel satisfaction of judgment, on the ground that it was procured by fraud or mistake, may be maintained by the attorneys who obtained the judgment. *Higginbotham v. May*, 233.
4. *Judgment creditors—Enforcement of lien.*—A suit to enforce lien of judgment, if found subsisting in suit to cancel satisfaction thereof, may, during pendency of latter suit, be maintained by the owners of the judgment, in the nature of a cross bill. *Idem.*
5. *Payment by note.*—Holder of note sending it to attorneys with instructions to renew, if possible, but otherwise to sue, and after judgment is obtained receiving from them new note and money, with intimation that if a small balance is soon paid they will receive it in satisfaction of the judgment, which holder accepts and announces the balance due, but doing nothing further for five years, thereby ratifies the act of the attorneys in endorsing the judgment as "satisfied." *Idem.*
6. *Trust deed—Notice of sale—Equity jurisdiction.*—Where a court of equity has taken charge of the execution of a trust, it should prescribe a reasonable notice of at least thirty days for sale of the trust property, notwithstanding the fact that the deed required "ten days at the least." *Morris v. Va. State Ins. Co.*, 370.
7. *Idem—Place of sale.*—Where sale shall be made lies in the trustee's discretion in case the deed does not name the place; but if either party disapproves his decision, he should, before the sale, apply to the court for instructions. *Idem.*
8. *Idem.*—Where property on outskirts of Richmond was to be sold under a trust deed naming no place of sale, trustee selected the city hall, to which the debtor objected, that it would sell higher on the premises: *held*, the debtor's wishes should govern. *Idem.*
9. *Idem—Sale in parcels—Injunction.*—Deed not prescribing sale by parcels must be construed by the statute requiring, in case of default, the trustee "to sell the property conveyed by the deed, or so much thereof as may be necessary." *Held*, if it will sell higher by parcels, and the owner requests such sale, and trustee refuses, a court of equity will intervene. *Idem.*
10. *Idem—Personal confidence.*—The trustee must act in person, and not by agent. *Idem.*
11. *Powers—Executions.*—Where husband devised his estate to his wife with power to dispose of it by will, *held*, she cannot execute the power by a conveyance during her lifetime, such conveyance being not merely such a defective attempt to execute the power as a court cannot aid and remedy, but in plain disregard of it. *Gaskins v. Fink*, 384.
12. *Infants' lands—Exchanges—Validity.*—Under decree in suit by father

EQUITABLE JURISDICTION AND RELIEF—*Continued.*

- in 1884, land of his infant children was exchanged for his own land. The bill was not filed by one authorized so to do, the trustee was not a party, and in other respects also the proceedings were not conformable to Code, 1873, p. 932, even had that statute provided for the exchange of such lands: *held*, the exchange was not validated by the act of 1888, Sess. Acts 1887-'88, p. 504. *Brown v. Putney*, 447.
13. *Resulting trust*.—Equity hath exclusive jurisdiction where plaintiffs claim that land was bought with funds of their ancestors' estate by his administrator, who took the title in his own name, and afterwards listed it in his schedules in bankruptcy, but with a declaration of the said trust written therein, which affected with notice the purchasers of the land under the bankrupt proceedings. *Moorman v. Arthur*, 455.
 14. *Evidence*.—In the case here, *held*, that though parol testimony is admissible to establish a resulting trust against the letter of a deed, yet the trust must be proved, as alleged, by clear, cogent, and explicit evidence; and that the evidence adduced to establish the trust claimed by the plaintiffs, is not such, but on the contrary, is conflicting, improbable, and insufficient. *Idem*.
 15. *Resulting trust—Distributees—Creditors*.—Where administrator converts his intestate's personalty into real estate, a trust-will result therein for the benefit of his widow as to one-third, and his children as to the residue; but his creditors may, through a court of equity, subject the real estate to the payment of their debts, if the personalty was liable therefor. *Idem*.
 16. *Breach of contract*.—A claim for damages for a breach of contract to do some collateral thing, is not a fit subject for the jurisdiction of a court of equity. *Wütz, Beidler & Co. v. Mullins' Per. Rep.*, 805.
 17. *Trust deed—Remedy*.—Where suit is brought to enforce a deed of trust whereby are secured "all the debts and liabilities of certain firms and of the individuals composing them": *held*, no claim merely sounding in damages for breach of contract to deliver shares of stock, ought to be taken cognizance of by a court of equity, but the claimants should be left to their remedy at law. *Idem*.
 18. *Cases compared*.—*Nagle v. Newton*, 22 Gratt., 814, and *Campbell v. Rust*, 80 Va., 653, compared with and distinguished from the case at bar. *Idem*.
 19. *Failure of purpose*.—The bill avers that the note was delivered for one purpose and without the parties' consent, was used for a different purpose, and that *Solenberger v. Gilbert*, 86 Va., 778, rules the case: *held*, the averment of fact is not sustained by the proof. *Ronald v. Bank of Princeton*, 813.
 20. *Married women—Exchange—Fraud—Relief*.—Previous to 1877, Mrs. K. owned land in fee, and she and her husband conveyed it to P.,

EQUITABLE JURISDICTION AND RELIEF—*Continued.*

taking his bonds payable to K. ; and the same day bought the "Cassell place," K. executing his bonds for the price, with P. and A. as sureties, the latter being privy to the fact that the sale and purchase were one transaction. P.'s bonds were assigned to A., who agreed to apply them to the Cassell purchase money, but instead, applied them to a debt due himself from K. The "Cassell place" was sold for the unpaid purchase money : **Held :**

1. The sale of Mrs. K.'s land did not amount to a conversion thereof into personalty, but the sale and purchase was one transaction, as to these parties, and constituted an exchange of lands.
2. K. owned a life estate in his wife's land whilst she was entitled to the reversion thereof.
3. The application of the bonds of P. to the debt due A. from K. instead of to the Cassell purchase money, was a fraud upon Mrs. K.'s right to the extent of the value of her reversion in her land, and the estate of A. is liable to her therefor. *Aston's Adm'r v. Kendrick*, 825.
21. *Specific performance—Damages.*—Equity may enforce specific performance of a contract to do on plaintiff's property definite work, wherein he had a material interest, and there cannot be adequate compensation in damages ; and may also, as ancillary, award damages for a breach of the contract. *Grubb v. Starkey*, 831.
22. *Ouster.*—Where the court has once acquired jurisdiction upon equitable grounds, no subsequent act of the defendants can oust that jurisdiction. *Idem.*
23. *Complete adjudication.*—When a court of equity has once acquired jurisdiction, it may go on to a complete adjudication, even to the extent of establishing legal rights and granting legal remedies, which would otherwise be beyond the scope of its authority. *Idem.*
24. *Non-residents—Judgments in personam.*—Where non-resident defendants who have been proceeded against by publication under attachment, appear and defend on the merits, judgments and decrees *in personam* may be entered against them. *Idem.*
25. *Custody of children—Doctrine.*—The future, welfare and interest of the child is the paramount consideration as respects its custody against the claims of either or both of its parents, and notwithstanding a statute recognizing the superior rights of the father. *Slater v. Slater*, 845.
26. *Idem.*—Where the father, though not very affectionate, is yet thoughtful and solicitous for the personal and spiritual welfare of his family, and successful in business and able to provide for them, whilst the mother, though affectionate, is dependent on her parents for support : *held*, the children must be committed to their father. *Idem.*

EVIDENCE.

1. *Criminal proceedings*.—Testimony that certain corn found in the house of one on trial for larceny thereof, was the corn stolen, in the witness' opinion, and to the best of his knowledge and belief, founded on the fact that certain articles were in it that were also in the stolen corn : *held*, unobjectionable. *Combs' Case*, 88.
2. *Murder—Suspicion not proof*.—In case at bar : *held*, that though the facts certified in the record present strong grounds of suspicion against the prisoner, yet they are not sufficient to establish beyond a reasonable doubt the prisoner's guilt of the crime for which he stands indicted. *Tilley's Case*, 99.
3. *Previous assault*.—On trial for murder, testimony that about three weeks before the homicide the bed of the deceased was fired into : *held*, admissible, where prisoner several times mentioned the firing in a manner indicating he had done it himself, or procured it to be done. *Taylor's Case*, 109.
4. *Uncommunicated threats*.—Though after the homicide prisoner absconded, the exclusion of uncommunicated threats against him : *held*, not error. *Idem*.
5. *Rumor—Flight*.—General talk in the community that if certain persons found prisoner they would kill him without attempting to arrest him : *held*, inadmissible on trial for murder to rebut the fact of his immediate flight and concealment and endeavor to leave the State. *Idem*.
6. *Indictment against another*.—It is not error to exclude as evidence an indictment against another person for the same offence. *Idem*.
7. *Insurance—Parol evidence*.—As parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written contract, an insured who could not read English will not be permitted, in the absence of fraud, to prove that his application was filled up by the agent, that he was not questioned as to his books ; that he did not tell him he would keep his books in an iron safe or secure in another building, and that the questions and answers were not read to him. *Va. F. & M. Ins. Co. v. Morgan*, 290.
8. *Declarations of trust—Notice to purchasers*.—Where petitioner in bankruptcy appends to inventory of his property a declaration that one parcel had been bought with trust money, though it stood in his name, such declaration is unauthorized by the federal statute, and constitutes no notice of such trust to purchasers at the sale under the bankrupt proceedings. *Moorman v. Arthur*.
9. *Idem—When admissible*.—Such declarations to be admissible must have been made when declarant had no interest to make them, and not when made in favor of his own family against his creditors, by one who is not only insolvent, but in bankruptcy. *Idem*.
10. *Resulting trust*.—In the case here : *held*, that though parol testi-

EQUITABLE JURISDICTION AND RELIEF—*Continued.*

mony is admissible to establish a resulting trust against the letter of a deed, yet the trust must be proved, as alleged, by clear, cogent, and explicit evidence; and that the evidence adduced to establish the trust claimed by the plaintiffs, is not such, but on the contrary, is conflicting, improbable, and insufficient. *Idem.*

11. *Opinion.*—Question to witness in action for killing one walking on railroad track as to whether there was enough in deceased's appearance to indicate to the engineer that he was in possession of his faculties: *held*, inadmissible as asking for witness' opinion on a fact which it is the province of the jury to determine from the facts testified to. *Tyler, Rec'r v. Sites*, 539.
12. *Assignor—Declarations.*—Declarations, either oral or written, of assignor that a chose in action had been paid: *held*, inadmissible unless made before the assignment thereof, and the same is true as to vendor of property after sale as against vendee thereof. *Ginter v. Breeden*, 565.
13. *Declarations of agent—Hearsay.*—Agent's admission binds principal only when made whilst the transaction is going on. If made afterwards, it is mere hearsay. *Lake v. Tyree*, 719.
14. *Evidence—Bills of Exceptions.*—In determining questions of admissibility of evidence, this court cannot look outside of the bills of exception taken to its exclusion. *Idem.*

EXECUTOR. (*See Personal Representatives.*)

FRAUD.

Equitable jurisdiction and relief—Cancellation of satisfaction of judgment—Attorneys.—A suit to cancel satisfaction of judgment, on the ground that it was procured by fraud or mistake, may be maintained by the attorneys who obtained the judgment. *Higginbotham v. May*, 233.

FRAUDULENT CONVEYANCES.

Parties—Fraudulent conveyances.—A suit to set aside a trust deed giving preference to creditors, as fraudulent, cannot be maintained without making the beneficiaries parties. *Simon v. Ellison*, 157.

GRAND JURY.

Regular—Special.

(*See Criminal Jurisdiction and Proceedings.*)

HABEAS CORPUS, WRIT OF.

Constitution.—K. was received in the penitentiary October 16, 1885, from the city of Richmond, and again February 14, 1891, from New
VOL. XC—123

HABEAS CORPUS, WRIT OF—*Continued.*

Kent county. He was taken February 5, 1892, before the circuit court of said city and arraigned and identified as the same person who had been twice convicted, and was sentenced to five years additional confinement. These proceedings were under Code, §§ 4179, 4180, 4182, and 4183. On his petition for a writ of *habeas corpus*, held, those sections are constitutional and valid, and the proceedings under them were regular, and the writ is denied. *King v. Lynn*, *Sup't*, 345.

HIGHWAYS.

1. *Easements*.—No easement in land which has been established as a public road can be acquired by subsequent arbitration proceedings between the original owner and the mover of the proceedings to establish such road, to which the subject is no party. *Railroad Co. v. Rasnake*, 170.
2. *Injury to highways—Suit for damages*.—On R.'s motion the county court established a public road through B.'s land. B. appealed. By consent the appeal was dismissed. The circuit court, at a later term, made an order referring the question of the road and damages to arbitration. The award was entered up, at a term still later, as the order of the circuit court. Afterwards a railway company injured the roadway, and R., claiming he had acquired an easement therein by virtue of said order, sued said company for damages for the injury: held, (1) The dismissal of the appeal ended the jurisdiction of the circuit court over the case. (2) The award entered as the judgment of that court, even had it had jurisdiction, could not confer on R. any right in the road, which was a public highway. (3) R. had no cause of action for the injury against the company. *Idem*.

HUSBAND AND WIFE.

1. *Common law—Earnings*.—At common law marriage is an absolute gift to the husband of all the wife's personal estate, including her earnings, which did not become her separate estate until May 1, 1888, and property purchased before that time with her earnings is subject to her husband's debts. *Grant v. Sutton*, 771.
2. *Separate estate—Burden of proof*.—Where wife has during coverture purchase property, she must show that it was purchased with her separate estate, in order to protect it from her husband's creditors. *Idem*.

INDICTMENT. (*See Criminal Jurisdiction and Proceedings.*)

INJUNCTIONS.

1. *Power of lower court.*—Judge of lower court has no power when the case is at rules and that court is not in term, to increase the bond upon an injunction granted by a judge of this court after its refusal by the lower court, and its return and recordation therein, although it becomes in effect an order of that court, which might be acted upon as such by that court in term. *Ruffin v. Commercial Bank*, 708.
2. *Collateral security.*—Where claim of adverse party is fully protected by collaterals, an order to increase an injunction bond, *held*, error. *Idem*.
(See *Equitable Jurisdiction and Relief*.)

INSTRUCTIONS.

1. *Reasonable doubt.*—It is not error to strike out the words, “to doubt is to acquit,” from an instruction where the law of reasonable doubt was given in its most favorable form for the prisoner. *Taylor’s Case*, 109.
2. *Inferences.*—It is not error to refuse to instruct the jury that no inference can be drawn from prisoner’s failure to introduce any evidence to show where he was on the day of the homicide, where it is in evidence that he told a witness that he was at that time in another State, as instructions not applicable to the evidence are inadmissible. *Idem*.
3. *Employees—Risks.*—In action by employee for personal injuries, it is not error to instruct that a servant entering upon dangerous employment assumes all incident risks, but not extraordinary risks arising from defective machinery, unless he has knowledge thereof, and chooses to remain in the employment. *Richlands Iron Co. v. Elkins*, 349.
4. *Idem—Duty of employer.*—Nor is it error to instruct that it is employer’s duty to use ordinary care to provide reasonably safe and suitable machinery, and that in absence of notice to the contrary, employee is warranted in assuming that employer has performed his duty in so providing. *Idem*.
5. *Idem—Questions by jury.*—After instructions to jury and they have retired and returned and stated their inability to agree, it is not error to give them further instructions upon questions submitted by them and discussed by court and counsel for both parties in absence of the jury. *Idem*.
6. *Insurance—Premium—Payment.*—Plaintiff was insured against loss by fire by defendant, who delivered the policy to brokers who had placed for it many policies, remitting premiums at intervals. They delivered policy to plaintiff’s agent without collecting premium. Afterwards, before the loss, plaintiff paid premium to agent, who

INSTRUCTIONS—*Continued.*

paid brokers a sum which he testified included the premium, and took receipt "on account of miscellaneous companies." Policy provided that company should not be liable until premium actually paid. The trial court instructed that if the premium was embraced in the sum the agent paid the broker, the jury should find that the premium had been paid: *held*, no error. *Wytheville Ins. & Banking Co. v. Teiger*, 277.

7. At the trial the court instructs that "if the jury, from the evidence, believe that prisoner willfully inflicted upon deceased a wound calculated to endanger or destroy life, and that death ensued therefrom within a year and a day, the prisoner is none the less responsible for the result, although it may appear that the deceased might have recovered but for the aggravation of the wound by unskilful or improper treatment." *Held*: No error. *Clark's Case*, 360.
8. *Malice aforethought*.—To constitute murder, the killing must be pre-determined, yet the design to kill need not have existed for any particular length of time and may be formed at the moment of committing the act, and an instruction on a murder trial, that it is not necessary that the design of killing should have existed "for any length of time": *held*, not misleading as being equivalent to telling the jury that a killing on sudden impulse is murder. *Brown's Case*, 671.
9. *Burden of proof*.—In action on check given for price of land, there is a plea of *nil debet* and also a special plea of fraud in the sale, and the jury is instructed that the defendant must prove his special plea, but the plaintiff's duty to prove the case made in his declaration is ignored: *held*, such instruction works no injury to the defendant where it is given after the evidence relating exclusively to the special plea, has been closed. *Lake v. Tyree*, 719.
10. *Compromise*.—At such trial the jury were instructed that no compromise between the parties, or any one else, could bar the prosecution. *Held*: No error; nor is an instruction in the language of the statute, Code, § 3677. *Barker's Case*, 820.
11. *Duty of jury*.—It being no more the duty of the jury to *endeavor* to acquit than to convict, an instruction that the jury should endeavor to reconcile all the evidence with the presumption of the innocence of the accused: *held*, properly denied. *Idem*.
12. *Evidence*.—Where there is no evidence tending to support an instruction that is asked for, *held*, it is properly denied. *Lewis' Case*, 843.
13. *Wills—Capacity—Undue influence*.—It is error in a suit to set aside a will for testamentary incapacity and undue influence, to refuse an instruction asserting that undue influence is any means employed with the testator, which under the circumstances, he cannot well resist and which induces him to do what otherwise he would not do. *Chappell v. Trent*, 849.

INSTRUCTIONS—*Continued.*

14. *Idem—Misleading.*—An instruction that the influence to vitiate a will must amount to force and coercion obstructing free agency, and not the mere influence of affection and attachment nor mere desire of gratifying another's wishes, is misleading as being calculated to impress the jury that only physical force or threats of personal violence would be sufficient to vitiate a will, and is erroneous. *Idem.*
15. *Idem—Assumption of facts.*—It is error to give an instruction ignoring the question of testamentary capacity, and thus assuming its existence, and suggesting that unless it be shown that the will was the result of irresistible importunities, or was made purely for the sake of peace, it must be upheld. *Idem.*
16. *Idem—Previous declarations.*—An instruction assuming that the provisions of a will accord with testator's affections and previous declarations is erroneous where it devises all of testator's property to persons not related to him, and is contrary to his previous declarations to the effect that he did not intend to make any will, and he is not shown to have had any affection for such beneficiaries. *Idem.*
17. *Idem—Signature of testator.*—An instruction that a will is invalid unless in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to manifest that the name is intended as a signature, and unless it be wholly written by the testator, the signature must be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time, and such witnesses must subscribe the will in testator's presence, is in accordance with the statute and covers the whole ground, and any addition to the effect that such direction need not be in any particular form, but may be given by testator spontaneously or at the suggestion of another, should not be given. *Idem.*

INSURANCE.

1. *Delivery—Waiver.*—It is a waiver of the condition of prepayment to deliver a policy without requiring prepayment of premiums. *Wytheville Ins. & Banking Co. v. Teiger*, 277.
2. *Payment of premiums.*—Where company charges premiums personally to the agent, who gives credit to the insurer: *held*, it amounts to payment. *Idem.*
3. *Apparent agent—Estoppel.*—When insurance company clothes a person with apparent authority to deliver policies and receive premiums: *held*, it is estopped, after policy is delivered to innocent holder, to set up a defence that the agent acted without written authority. *Idem.*
4. *Instructions—Payment.*—Plaintiff was insured against loss by fire by defendant, who delivered the policy to brokers who had placed for

INSURANCE—*Continued.*

it many policies, remitting premiums at intervals. They delivered policy to plaintiff's agent without collecting premium. Afterwards, before the loss, plaintiff paid premium to agent, who paid brokers a sum which he testified included the premium, and took receipt "on account of miscellaneous companies." Policy provided that company should not be liable until premium actually paid. The trial court instructed that if the premium was embraced in the sum the agent paid the broker, the jury should find that the premium had been paid : *held*, no error. *Idem*.

5. *Warranties*.—A warranty is an agreement in the nature of a condition precedent, and like that must be strictly complied with, whether material or not. *Va. F. & M. Ins. Co. v. Morgan*, 290.
6. *Conditions—Iron safe clause*.—In application for policy of fire insurance insured was asked if he would keep his account books in an iron safe, or secure in another building. He answered in the affirmative : *held*, the statement was a warranty.
7. *Parol evidence*.—As parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written contract, an insured who could not read English will not be permitted, in the absence of fraud, to prove that his application was filled up by the agent, that he was not questioned as to his books ; that he did not tell him he would keep his books in an iron safe or secure in another building, and that the questions and answers were not read to him. *Idem*.
8. *New policy*.—Assured asked company's agent to permit removal of insured property. Agent said there were so many endorsements on old policy it would be best to cancel it and take a new one for the return premium at *pro rata* rates. Company issued a new policy expiring at an earlier day, but it was not delivered to assured. The property was burned after expiration of the new, but before that of the old policy : *held*, the company is liable for the loss. *Hardin v. Alexandria Ins. Co.*, 413.
9. *Agents*.—Insurance company supplies one with all needful blanks, responds to his acts, approves of his permits to remove insured property, and pays the rent of his office : *held*, it is bound by his doings as its agent. *Idem*.
10. *Policy of insurance—Conditions—Construction*.—It is now well settled that where two constructions may be placed on language of policy, the one most favorable to the insured is to be adopted, and in case of doubt, the terms are to be construed most strongly against the insurer. *Va. F. & M. Ins. Co. v. Thomas*, 658.
11. *Idem—Change of title*.—Clause avoiding policy if there should be any change in title or interest of assured unless company was notified in writing, where one of a firm assured, was a married woman whose husband managed her interest, and she died, bequeathing her prop-

INSURANCE—*Continued.*

erty to her husband, remainder to her son, and the business was conducted as before until the fire: *held*, no such change as avoided the policy. *Idem.*

12. *Idem*—*Tin shop—Manufacturing.*—A policy insuring a tin shop, though containing a provision against a manufacturing establishment, yet allows making tin cans and other such work as is usually done in such shops. *Idem.*

INTEREST.

Funds in custodia legis.—Where the funds have remained in the court's hands during the litigation, interest, *held* not allowable except from date of judgment. *Daniel's ex'or v. Wharton*, 584.

INTER-STATE COMMERCE.

Telegraph companies—Penalties.—Code, § 1292, providing that every telegraph company shall deliver a telegram promptly to the person to whom it is addressed, and that for every failure to forward or deliver same as promptly as possible, the company shall forfeit \$100 to the person sending it, or to the person to whom it is addressed: *held*, not a burden upon, or a regulation of, commerce, and not in conflict with any act of Congress, or with the inter-state commerce clause of the United States Constitution; and the action to enforce the forfeiture need not be in the name of the commonwealth. *Telegraph Co. v. Tyler*, 297.

JOINT STOCK COMPANIES. (*See Corporations.*)

JUDGMENTS.

1. *Lands in another county—Purchasers.*—Purchaser of land under decree in county wherein it lies, is not affected by constructive notice of judgment in another county which is not docketed in former county until after sale is confirmed and purchase-money paid, though title is retained. *Logan v. Pannill*, 11.
2. *Assignees.*—Judgment not docketed in county wherein land of the debtor lies, and is sold under decree in partition, does not, upon being docketed in said county, become a lien upon bonds for the purchase-money in hands of assignee who has no notice of the judgment, though title to the land was retained, and those bonds being personalty, and no execution had been issued. *Idem.*
3. *Remedy at law—Injunction.*—An injunction will not be awarded to a judgment by default upon summons directed to sheriff of another county than the one where the action is brought, although the sum-

JUDGMENTS—*Continued.*

- mons was issued contrary to law, as the judgment, though erroneous, is not void, and the defendant has a complete remedy at law by motion under Code, § 3451. *Brown v. Chapman*, 176.
4. *Equitable jurisdiction and relief—Cancellation of satisfaction of judgment—Attorneys.*—A suit to cancel satisfaction of judgment, on the ground that it was procured by fraud or mistake, may be maintained by the attorneys who obtained the judgment. *Higginbotham v. May*, 233.
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 6. *Payment by note.*—Holder of note sending it to attorneys with instructions to renew, if possible, but otherwise to sue, and after judgment is obtained receiving from them new note and money, with intimation that if a small balance is soon paid they will receive it in satisfaction of the judgment, which holder accepts and announces the balance due, but doing nothing further for five years, thereby ratifies the act of the attorneys in endorsing the judgment as "satisfied." *Idem*.
 7. *Judgments confessed—Statute—Common law.*—Though Code, § 3233, provides that in *any suit* defendant may confess judgment in the clerk's office, *held*, a judgment there confessed is not invalid because there was *no suit pending* and no previous process issued, as judgments by confession existed at common law whereof the statute is mainly declaratory, and only substantial compliance is required to validate such a judgment. *Saunders v. Lipscomb*, 647.
 8. *Idem—Minute book.*—Code, § 3283, requiring clerk to enter in his order or minute book a judgment confessed in his office, *held* directory only, and his failure to do so does not invalidate the judgment. *Idem*.
 9. *Non-residents—Judgments in personam.*—Where non-resident defendants who have been proceeded against by publication under attachment, appear and defend on the merits, judgments and decrees *in personam* may be entered against them. *Grubb v. Starkey*, 831.

JUDICIAL SALES.

1. *Judgments—Lands in another county—Purchasers.*—Purchaser of land under decree in county wherein it lies, is not affected by constructive notice of judgment in another county which is not docketed in former county until after sale is confirmed and purchase money paid, though title is retained. *Logan v. Pannill*, 11.
2. *Idem—Assignees.*—Judgment not docketed in county wherein land of

JUDICIAL SALES—*Continued.*

- the debtor lies, and is sold under decree in partition, does not, upon being docketed in said county, become a lien upon bonds for the purchase money in hands of assignee who has no notice of the judgment, though title to the land was retained, and those bonds being personalty, and no execution had been issued. *Idem.*
3. *Vendor's lien—Decree of sale.*—A portion of amount not being due, where the time when due is stated in a decree of sale to enforce a vendor's lien, does not render the decree erroneous. *Moore v. Green*, 181.
 4. *Idem—Decree for re-sale.*—If it be error to decree to plaintiff the right to recover on a vendor's lien for an amount not then due, such error will be cured by a decree for resale after the amount becomes due. *Idem.*
 5. *Purchasers—Account of liens.*—Purchasers under decree should not be required to take or pay for the property where it had been thrice sold without an account of liens and the title is uncertain. *Eller v. Scott*, 762.
 6. *Rents and profits.*—Where the bill fails to allege, and it is not proved, that the rents and profits will not within five years discharge the liens: *held*, error to decree sale. *Idem.*
 7. *Previous sale.*—Purchasers at such sale should not be compelled to complete their purchase where the land has been previously sold in another suit, and neither the sale nor the decree therefor has been set aside. *Idem.*
 8. *Sale commissioner.*—Owner of half of the judgment, to satisfy which the suit is brought to sell land: *held*, incompetent to act as commissioner to sell. *Idem.*

JURISDICTION.

1. *Circuit courts—Motion to recover forfeits.*—Said courts have no jurisdiction of motions to recover forfeits specified in § 1292, as § 3211 authorizes the remedy by motion only in cases where plaintiff is entitled to recover money on action or a contract, and the proceeding to recover such forfeit is founded, not upon a contract, but upon a tort: *i. e.*, a wrongful violation of a public duty. *Western Union Tel. Co. v. Bright*, 778.
2. *Idem—Special powers—Record—Dismissal.*—Where a court acts under special powers, it has only the jurisdiction expressly delegated, and it must appear from the record that its acts are within its jurisdiction; and the court will dismiss the case at any time when the fact is brought to its notice. *Idem.*

JURY. (*See Criminal Jurisdiction and Proceedings.*)

VOL. XC—124

JUSTICES.

1. *Prohibition—New trial.*—A writ of prohibition will be granted to restrain a justice from allowing a new trial after more than thirty days after judgment, and to restrain defendant from proceeding after such new trial is allowed. *Burroughs v. Taylor*, 55.
2. *Appointment of Justices.*—Code, § 97, authorizing county courts to appoint additional justices to the number specified in the constitution when the public service requires it: *held*, not violative of sections 2 and 4, article VII of the constitution, and not an unwarranted delegation of legislative power. *Ex parte Bassitt*, 679.

LACHES.

1. *Limitation of action.*—The federal statute limiting actions by or against assignees in bankruptcy as to property vested in them to two years, applies not to suits against purchasers from such assignees. Nor can the claims of persons to said property be barred by *laches* so long as they are ignorant of their rights. *Moorman v. Arthur*, 455.
2. *Corporations—Subscriptions to stock—Fraud.*—*Laches* does not begin to run until subscriber is chargeable with notice that a fraud has been perpetrated upon him. *Virginia Land Co. v. Haupt*, 533.
3. *Idem—Notice—What is—Duty to investigate.*—Mere suspicions or random statements heard in public, or in stockholders' meetings, do not necessarily constitute notice. But after a subscriber's suspicions are reasonably aroused, it is his duty to investigate at once. *Idem*.
4. *Idem—Burden of proof.*—Corporation has the burden of proof in asserting that the subscriber had notice and was guilty of *laches*. *Idem*.
5. *Loss of evidence—Limitation.*—Delay of twenty-six years in bringing suit to enforce a vendor's lien, where the delay is explained by the loss of the court records and the destruction of the creditor's books showing the existence of the lien, *held*, will not prevent a recovery. And there is no limitation to the life of such lien saving that arising from presumption of payment from lapse of time. *Ginter v. Breden*, 565.
6. *Presumption of payment—Stay law.*—Where vendor's lien accrued in 1860, the stay law period must be excluded from the twenty years necessary to create the presumption of payment, and no such presumption had arisen when this suit was brought in 1888. *Idem*.
7. *Partnership—Dissolution—Contribution.*—A surviving partner who, after his co-partner leaves the State, takes possession of the assets, which are ample to pay the firm's indebtedness, and assumes control of the business, undertaking to close it up, and fails for thirty-four years to render any account, or make any claim against his co-partner or his estate for contribution for firm debts paid by him:

LACHES—*Continued.*

held, precluded by his *laches* from claiming such contribution and subjecting his deceased partner's lands, in the hands of his widow and children, to the payment of a share of such debts. *Compton v. Thorn*, 653.

LEASE.

1. *Mines—Forfeiture—Waiver.*—The right to insist upon forfeiture of coal lease for breach of condition subsequent, *held*, waived by the lessor recognizing lessee's right to assign the lease. *Deaton v. Taylor*, 219.
2. *Idem—Royalties—Transportation.*—Lease of coal mine is not forfeited by failure to make the required output or pay royalties, when the lease provides that failure to get transportation shall excuse the making of such output, and transportation was not obtained and the payment of royalties was waived as provided in the lease. *Idem*.

LEGACY. (*See Wills.*)

LESSOR AND LESSEE.

1. *Mines—Lease—Forfeiture—Waiver.*—The right to insist upon forfeiture of coal lease for breach of condition subsequent, *held*, waived by the lessor recognizing lessee's right to assign the lease. *Deaton v. Taylor*, 219.
2. *Idem—Royalties—Transportation.*—Lease of coal mine is not forfeited by failure to make the required output or pay royalties, when the lease provides that failure to get transportation shall excuse the making of such output, and transportation was not obtained and the payment of royalties was waived as provided in the lease. *Idem*.

LIBEL AND SLANDER.

1. *Malice—Privileged communications.*—Mere publication of defamatory words is *prima facie* evidence of malice, but the occasion may rebut the presumption. *Strode v. Clement*, 553.
2. *Justification.*—To justify publication of defamatory matter, the occasion must be privileged, and must be used *bona fide* without malice. *Idem*.
3. *Court—Jury.*—Whether the occasion be privileged is a question for the court. Whether the occasion has been used *bona fide* without malice is a question of fact for the jury. *Idem*.
4. *Defamation—Privileged.*—A letter written by one believing he has an interest in the subject matter, stating that the addressee cannot afford to go through life with a breach of trust staining his character, that his books swarm with false entries which he refuses to correct,

LIBEL AND SLANDER—*Continued.*

- and that if he fails to properly account and make restitution, the writer will publish the facts in a manner most unpleasant to him : held, a privileged communication, and the writer not liable in an action for defamation in writing the letter. *Idem.*
5. *Action for defamation—Burden of proof.*—In such action for insults in a letter written on a privileged occasion, the burden is on the plaintiff to prove that the letter was written maliciously, by showing that the defendant availed himself of the occasion, not for the purpose of protecting his interests, but to gratify some ill-will independent of such occasion and to defame the addressee. *Idem.*
 6. *Slander—Repetition—Evidence.*—Under plea of not guilty in action for defamation, the defendant cannot introduce witnesses to prove that they heard the same slander. *Blackwell v. Landreth*, 748.
 7. *Idem—Verdict—Costs.*—In such action the trial court had no power to enter judgment for five dollars only, where the verdict was for that sum and costs, but if the verdict was irregular, it should have been set aside and a new trial awarded. *Idem.*
 8. *Idem—Inadequate damages.*—A verdict for five dollars and costs will be set aside as inadequate in action of slander of a girl of unblemished reputation by false imputations upon her chastity for the purpose of injuring an opposing candidate for office. *Idem.*

LIENS.

1. *Constitutional law—Special legislation.*—Code, § 2486, giving liens to persons furnishing supplies to a manufacturing corporation on all its property, superior to deeds of trust, &c., executed since March 21, 1877, is not contrary to amendment 14 to the constitution of the U. S. as being special and class legislation. *Va. Devel. Co. v. Crozer Iron Co.*, 126.
2. *Construction of statutes.*—Liens for supplies given, by § 2485, priority over deeds of trust, &c., executed since March 21, 1877, are not restricted to deeds of trust, &c., executed between that date and the date of the taking effect of that act, but have precedence over deeds of trust, &c., executed after the latter date. *Idem.*
3. *Vested rights—Impairment of charter.*—Section 2485 giving prior liens upon the property of manufacturing corporations for supplies is not invalid as impairing the charter right of such corporation to issue its bonds and secure them, as the charter was taken subject to the general law of the State, and such changes as might be made in that law.—*Idem.*
4. *General laws—Private acts—Acts of incorporation.*—Section 4203 excluding from operation of the Code any act passed by the legislature between March 15, 1887, and May 1, 1888, applies only to the

LIENS—*Continued.*

acts of a general nature and not to acts of incorporation, which are private acts. *Idem.*

5. *Supplies—What are under § 2485.*—Pig iron furnished a rolling mill, whose business is to manufacture iron, steel, and other metals, is "a supply" within the meaning of § 2485, giving a lien to all persons furnishing fuel and other supplies necessary to the operation of any manufacturing company. *Idem.*
6. *Lien for materials—Priority.*—Liens given by § 2485 are entitled to precedence as among themselves according to the times at which they are severally filed under § 2486, that first filed taking preference. *Idem.*

LIQUOR, SALE OF.

1. *Code, § 534.*—Under said section a single sale of liquor without a license is a violation, as the law is not limited to persons engaged in carrying on the traffic. *Lewis' Case*, 843.
2. *Joinder of offences.*—The indictment in this case contains ten counts, each charging a sale to a different person, which constitutes separate and distinct offences: *held*, the demurrer was properly overruled. *Idem.*
3. *Instructions—Evidence.*—Where there is no evidence tending to support an instruction that is asked for, *held*, it is properly denied. *Idem.*
4. *Cases Compared.*—*Piedmont Club v. Commonwealth*, 87 Va., 540, distinguished from case at bar. *Idem.*

LOCAL OPTION LAW.

1. *Indictment—Sale of liquor—Evidence—New trial.*—Indictment for unlawful sale of ardent spirits, charged that the offence was committed in a certain district where, under the local option law, "no license" prevailed. The evidence was that the defendant sold ardent spirits to witness in the county, but did not designate the district. Defendant moved to set aside the verdict of "guilty as charged in the indictment," and for a new trial; which motion was overruled: *held*, the motion should have been sustained. *Morgan's Case*, 80.
2. *Election under repealed statute—Validity.*—An election held July 1, 1886, under act of February 26, 1886, was not invalidated by repeal of that act after May 1, 1888, by the adoption of Code, § 4202. *Thomas' Case*, 92.
3. *Judicial cognizance—Election.*—The court will take notice judicially that at an election held under act of February 26, 1886, in the magisterial district wherein the offence is laid, the vote against license

LOCAL OPTION LAW—*Continued.*

prevailed, and no allegation to that effect is necessary in the indictment; and also that apple brandy is intoxicating. *Idem.*

4. *Clerical error.*—A mistake as to the date of an order entered in the record of the county court in relation to such election will not invalidate the election. *Idem.*

MANDAMUS, WRIT OF.

1. In case here: *held*, a *mandamus* will not be awarded to compel the clerk to docket and index such memorandum unless the original contract has been produced before him and proved or acknowledged as prescribed by law. *Callahan v. Young, Clerk*, 574.
2. *Jurisdiction—Answer*—Code, section 3094, providing that a writ of *mandamus* shall issue and be tried at the place of session of this court at which writs of error to such court are to be tried: *held*, controlling as to the place where the jurisdiction in the present case is to be exercised. *Hotchkiss v. Grattan, Judge*, 642.
3. *Treasurer—Deed.*—Where sale of land for taxes is made by an ex-collector, *mandamus* will not lie to compel the city treasurer to make a deed conveying the land to the purchaser. *McCullough v. Hunter*, 699.

MANSLAUGHTER.

1. *Self-defence.*—Upon the facts in this case as set out in the opinion of the court: *held*, there is no element of self-defence in it, and the verdict of guilty of manslaughter with five years' confinement in the penitentiary, will not be disturbed. *Clark's Case*, 360.
2. *Idem.*—Where death ensues on sudden provocation, or quarrel, without malice aforethought, the killing is manslaughter. To reduce the offence to killing in self-defence the accused must prove two things, to wit: (1) That before the mortal blow was given he declined further combat, and retreated as far as he could with safety, and (2) that he killed the deceased through the necessity of preserving his life or to save himself from great bodily harm. *Idem.*

MARRIAGE.

1. *Legitimacy—Invalid marriage.*—Wife leaves her husband and goes to another State. He marries again, and has children born of the second marriage before the first is dissolved: *held*, those children are legitimate. *Heckert v. Hile's Adm'r*, 390.
2. *Idem—Cases compared.*—The case of *Greenhow v. James*, 80 Va., 636: *held*, not to overrule *Stones v. Keeling*, 5 Call, 143. *Idem.*
3. *Restraint of marriage.*—A condition in such a devise to testator's sis-

MARRIAGE—Continued.

ters that they are to remain sole, and that in case of either marrying, the property shall thenceforth be enjoyed by the one remaining sole: *held*, null and void as placing a restraint upon marriage. *Smythe v. Smythe*, 638.

MARRIED WOMEN.

1. *Trust deed—Separate estate.*—A deed of trust executed by a married woman and her trustee on her equitable separate estate in land, her husband not joining in the deed, is void. *Taylor v. Cussen*, 40.
2. *Rents and profits.*—Such trust deed is not an incumbrance on the rents and profits of such estate where it does not appear that the loan secured by the deed was for her benefit, and where her intention was to create a *specific lien* on the estate. *Idem*.
3. *Husband—Estoppel.*—Where husband was not guilty of any fraud, actual or constructive, in negotiating the loan, he is not estopped from denying the validity of such deed. *Idem*.
4. *Resulting trusts—Estoppel.*—A married woman is not estopped from claiming as against her husband's creditors, a resulting trust in land paid for by her father and intended to be hers, but deeded to her husband by his collusion with the grantor, by reason of the failure of her father and herself to take positive action during his lifetime, if she did not then know how the title stood, nor what her father's intentions were, and did assert her title before it was assailed. *Steagall v. Steagall*, 73.
5. *Separate estate—Transfer.*—A debt secured by trust deed on land, became, under the creditor's will, the separate property of a married woman, with whose knowledge and consent it was settled with her husband in the purchase of land that was conveyed to her and yet remains hers. Subsequently the bond of matrimony between them was annulled, but the rights of property were left by the decree as they stood at its date. Afterwards she claimed the debt as her property and as unpaid, alleging her ignorance of her rights under act of April 4, 1877, at the time of the settlement. By her direction the trustee advertised the land for sale under the trust deed. The debtor obtained an injunction to the sale: *Held*:
 1. Under that act a married woman may give her separate estate to her husband, and her ignorance of the law does not invalidate the transaction.
 2. The rights of property between them became *res judicata* by the decree of divorce.
 3. The injunction was rightly perpetuated, as the debt has been paid, and the grantor in the trust deed is entitled to have it released. *Osburn v. Throckmorton*, 311.
6. *Adverse possession.*—It appearing that the four children held jointly,

MARRIED WOMEN—*Continued.*

adversary possession of the land until 1843, when the fourth child was under the disability of coverture and remained such till after 1881: *held*, there could be no adversary possession against her in favor of her co-tenants during her coverture. *Buford v. North Roanoke L. & I. Co.*, 418.

7. *Deed of married women—Defective acknowledgment.*—Where certificate of acknowledgment to deed of a married woman in 1887, failed to state that she acknowledged the same to be her act, and that she willingly executed it: *held*, the deed is void. *Clinch River Veneer Co. v. Kurth*, 737.
8. *Idem—Executory contract.*—Deed defectively acknowledged may not pass the legal title, but may be enforceable in equity as an executory contract, and will uphold a trust deed made on faith of it, especially where the one as to whom it is defective, makes no objection on that account and is ready to carry out her part of the contract and receive the money intended to be secured to her by the trust deed. *Idem*.
9. *Exchange—Fraud—Relief.*—Previous to 1877, Mrs. K. owned land in fee, and she and her husband conveyed it to P., taking his bonds payable to K.; and the same day bought the "Cassell place," K. executing his bonds for the price, with P. and A. as sureties, the latter being privy to the fact that the sale and purchase were one transaction. P.'s bonds were assigned to A., who agreed to apply them to the Cassell purchase money, but instead, applied them to a debt due himself from K. The "Cassell place" was sold for the unpaid purchase money: *Held*:
 1. The sale of Mrs. K.'s land did not amount to a conversion thereof into personalty, but the sale and purchase was one transaction, as to these parties, and constituted an exchange of lands.
 2. K. owned a life estate in his wife's land whilst she was entitled to the reversion thereof.
 3. The application of the bonds of P. to the debt due A. from K. instead of to the Cassell purchase money, was a fraud upon Mrs. K.'s right to the extent of the value of her reversion in her land, and the estate of A. is liable to her therefor. *Aston's adm'r v. Kendrick*, 825.

MINES.

1. *Lease—Forfeiture—Waiver.*—The right to insist upon forfeiture of coal lease for breach of condition subsequent: *held*, waived by the lessor recognizing lessee's right to assign the lease. *Deaton v. Taylor*, 219.
2. *Idem—Royalties—Transportation.*—Lease of coal mine is not forfeited

MINES—*Continued.*

by failure to make the required output or pay royalties, when the lease provides that failure to get transportation shall excuse the making of such output, and transportation was not obtained and the payment of royalties was waived as provided in the lease. *Idem.*

MISTAKE.

Equitable jurisdiction and relief—Cancellation of satisfaction of judgments—Attorneys.—A suit to cancel satisfaction of judgment, on the ground that it was procured by fraud or mistake, may be maintained by the attorneys who obtained the judgment. *Higginbotham v. May*, 233.

MORTGAGE.

Chattel mortgages—Lex loci contractus.—A trust deed of chattels, valid and recorded in another State, is valid in this State, though not recorded here. *Craig v. Williams*, 500.

MOTIONS.

Circuit courts—Motion to recover forfeits.—Said courts have no jurisdiction of motions to recover forfeits specified in § 1292, as § 3211 authorizes the remedy by motion only in cases where plaintiff is entitled to recover money on action or a contract, and the proceeding to recover such forfeit is founded, not upon a contract, but upon a tort: i. e., a wrongful violation of a public duty. *Telegraph Co. v. Bright*, 778.

MUNICIPAL CORPORATIONS.

1. *Delegation of authority.*—City council cannot delegate to a committee its authority to sell the city's real estate. *Beal v. City of Roanoke*, 77.
2. *Pursuance of authority.*—Where council referred petition for purchase of such estate to "the Sewer Committee and the city solicitor with power to act," such committee cannot bind the city by a contract to sell without the solicitor's concurrence. *Idem.*
3. *Railroad Companies—Municipal subscriptions—Conditions precedent.*—City of Bristol is authorized by statute to subscribe and issue its bond for \$25,000 to the S. A. & O. railroad company; provided said statute shall not be in force until the company subscribed a certain sum to a furnace company. The railroad company merely procured a transfer to itself from the V. T. & C. railroad company of \$25,000 of stock in the furnace company; on which stock the S. A. & O. railroad company, being insolvent, did not even pay the assessments: held, the subscription of the said sum by the S. A. & O. railroad com-

MUNICIPAL CORPORATIONS—*Continued.*

pany to the furnace company was a condition precedent to the issue of the bonds of the city, with which such transfer was no compliance. *Echols v. City of Bristol*, 165.

MURDER.

1. *Suspicion not proof.*—In case at bar: *held*, that though the facts certified in the record present strong grounds of suspicion against the prisoner, yet they are not sufficient to establish beyond a reasonable doubt the prisoner's guilt of the crime for which he stands indicted. *Tilley's Case*, 99.
2. The evidence in the record warrants the verdict of guilty of murder in the first degree. *Taylor's Case*, 109.
3. *Malice aforethought—Instructions.*—To constitute murder, the killing must be predetermined, yet the design to kill need not have existed for any particular length of time and may be formed at 'the moment of committing the act, and an instruction on a murder trial, that it is not necessary that the design of killing should have existed "for any length of time": *held*, not misleading as being equivalent to telling the jury that a killing on sudden impulse is murder. *Brown's Case*, 671.
4. *Deadly weapons.*—Malice may be presumed from the use of a deadly weapon in the previous possession of the slayer. *Idem*.
5. *Principal in second degree.*—An accused may be guilty of murder in the second degree, though the fatal shot was fired by another, if the latter was engaged jointly with accused in a felonious act and fired the shot in attempting to accomplish their joint escape, the accused being present aiding and abetting the one who fired it. *Idem*.

NEGLIGENCE.

1. *Railroads—Crossings—Contributory negligence.*—Where a person, after standing near a railroad crossing, attempts to cross and is run over by a train, which he might see or hear if he looks or listens, is guilty of such contributory negligence as will prevent a recovery for his death, notwithstanding negligence of defendant in failing to sound the whistle or ring the bell. *Hogan v. Tyler, Rec'r*, 19.
2. *Railroad company—Negligent killing—Aler ego.*—An engineer, with the knowledge and permission of the conductor, who was the representative of the company, left his engine to be operated by an inexperienced fireman. Whilst making a flying switch, by the improper management of the engine by that fireman the brakeman was killed: *held*, the company was liable. *Railroad Co. v. Thomas' adm'r*, 205.
3. *Declaration—Sufficiency.*—Where declaration details the facts of such

NEGLIGENCE—*Continued.*

killing, and alleges that at the time thereof the engine was under the management of such firemen, it is sufficient, and notifies the company that it will have to defend for failure to keep a competent engineer. *Idem.*

4. *Employees—Risks—Instructions.*—In action by employee for personal injuries, it is not error to instruct that a servant entering upon dangerous employment assumes all incident risks, but not extraordinary risks arising from defective machinery, unless he has knowledge thereof, and chooses to remain in the employment. *Richlands Iron Co. v. Elkins*, 249.
5. *Idem—Duty of employer.*—Nor is it error to instruct that it is employer's duty to use ordinary care to provide reasonably safe and suitable machinery, and that in absence of notice to the contrary, employee is warranted in assuming that employer has performed his duty in so providing. *Idem.*
6. *Employer—Defective machinery.*—Where employer leaves a large rapidly revolving cogwheel unprotected, so that tongs carrying large masses of iron are liable to be caught and taken into it and the pieces thrown all about the room with such force as to kill any person with whom they come in contact, after having been warned by a skilled workman to encase it, such employer *held* liable for an injury to an employee resulting from the tongs catching in the cogs. *Idem.*
7. *Verdict—Damages.*—A verdict of \$2,500 for an injury to an employee, breaking his skull so that a part has to be removed, leaving the brain unprotected—by which his capacity to work is very much impaired: *held*, not excessive. *Idem.*
8. *Railroads—License—Duty of company.*—Where the public has been in the habit of crossing the railroad track on foot at a certain place for years without objection from the company: *held*, such acquiescence amounts to a license and imposes on the company the duty of taking reasonable care to avoiding injuring pedestrians. *Railroad Co. v. Wilson*, 263.
9. *Idem—Duty of persons crossing.*—Such pedestrians are bound to take ordinary precautions for their own safety, even if there was any negligence on the company's part. *Idem.*
10. *Idem—Injury to persons on the track.*—One crossing railroad at a place where the public is licensed to cross, who knowing that he is on one of the main tracks over which trains pass at all hours, fixes his attention upon a train on the other track which he has changed his course to avoid, and takes no precautions in looking out for trains upon the track on which he is walking, is guilty of such negligence as defeats his recovery for injuries from being struck by such train. *Idem.*
11. *Employees—Injuries—Contributory negligence—Disobedience.*—Where,

NEGLIGENCE—*Continued.*

contrary to rules, conductor allowed cars to be shifted and run down grade without an engine to control them, and whilst he was between the cars, a brakeman, without objection from the conductor, caused another car to run down the same way, which, by reason of defective brakes, could not be controlled, and struck the first-named cars with such violence that the conductor was injured: *held*, the conductor cannot recover on account of his own negligence and disobedience of the rules. *Richmond Co. v. Dudley*, 304.

12. *Idem*—*Presumption*.—Railroad companies are entitled to presume that cars delivered to them by connecting companies are in proper condition. *Idem*.
13. *Idem*—*Failure to inspect*.—Conductors who are required by the rules to inspect all cars picked up in transit, cannot recover for injuries received by them by reason of their failure to inspect such cars. *Idem*.
14. *Negligent injury*—*Licensee*.—Where one has been notified by defendant company that certain freight has arrived for him at its depot, and whilst walking along the passage to the freight room he is injured by several carelessly piled boxes of iron falling on him: *held*, he is a licensee, and the company is liable in damages. *Railroad Co. v. Brown*, 340.
15. *Brakeman*—*Action for injury*—*Declaration*.—In action against railroad company for the negligent killing of plaintiff's intestate, the declaration substantially averred that it was the duty of the company to have and maintain safe, sound, and suitable brakes to the cars on which the intestate was assigned to duty; that the company was guilty of negligence in suffering the brakes to the cars on which the intestate was employed at the time of his death to become so worn and broken as to be incapable of stopping the train as quickly as otherwise they would have done, and that the intestate's death resulted directly from this negligence on the part of the defendant company: *held*, the declaration is sufficient in law. *Beard's adm'r v. Railroad Co.*, 351.
16. *Railroads*—*Employees*—*Contributory negligence*.—Brakesman, side-tracking flat car, train having backed into siding, cut car loose, and signalled train to leave it. Car not clearing main track he signalled train to return and push it further. Train returning fast, he put one foot between iron rails loaded on car, and end of car, and other foot outside so as to set brake. Train struck car and rails slipped forward and crushed his foot: *held*, brakeman's negligent act caused accident, and he is not entitled to recover. *Railroad Co. v. De Butts*, 405.
17. *Employees*—*Risks*—*Other perils*—*Warning*.—An employee's assumption of the hazards of his employment, does not extend to the hazards

NEGLIGENCE—*Continued.*

of a work of a different character to which his employer temporarily orders him. And in such case, he is entitled to rely on his employer's giving him proper warning of other perils unknown to him, and from which said work necessarily distracts his attention. *Michael v. Roanoke Machine Works*, 492.

18. *Idem*—*Negligent injuries*.—One, employed as a helper in defendant's boiler shop, was ordered to do a novel and engrossing work—that of emptying certain oil pans; and whilst sitting on a wall twenty-five feet high with his legs hanging over its side, and reaching down two and a half feet to empty the pans with his left hand, he had to hang for support, his right arm across an iron rail on top of the wall, on which moved on flanged wheels a huge crane propelled by an engine. When he started to do the work the crane was stationary. He had to sit with his back to the crane, and was engrossed with emptying the third pan when the crane was set in motion, without warning to him, and passing over his right arm, crushed it. On demurrer to the evidence at trial of action for damages, *held*, the defendant company is liable, the injury being the result of its negligence, without contributory negligence on the plaintiff's part. *Idem*.
19. *Railroads—Injury to stock—Failure to fence*.—Where railroad company failed to fence its right of way along enclosed lands as required by Code, section 1258, in an action for stock killed on its track at a place not fenced as required: *held*, the company not allowed to prove that there was a lawful fence at said place erected by the land-owners, and that therefore it was not liable for the injury done there to the stock. *Railroad Co. v. McGavock's adm'rs*, 507.
20. *Burden of proof*.—LACY, J., *dissenting*, contended that "the effect of Code, § 1261, is to shift the burden of proving negligence from the plaintiff and place on the company the burden of proving the negative of this proposition. *Idem*."
21. *Railroads—Trespassers—Injuries—Deaf mute*.—Persons in charge of a train have the right to assume that one walking on the track will get off before train reaches him; and the company is not liable for the death of a deaf mute who was walking on the track with his head bent down without looking for a train, and was struck by a train and killed. *Tyler, Rec'r, v. Sites*, 539.
22. *Idem—Opinion—Evidence*.—Question to witness in action for killing one walking on railroad track as to whether there was enough in deceased's appearance to indicate to the engineer that he was in possession of his faculties, *held*, inadmissible as asking for witness' opinion on a fact which it is the province of the jury to determine from the facts testified to. *Idem*.
23. *Railroad companies—Brakeman—Low bridge*.—Such company is not

NEGLIGENCE—*Continued.*

liable for the death of a brakeman who was struck by the fourth sill of a dangerously low bridge after he had passed safely under the three first sills by stooping and lowering his head, when he had full knowledge of the dangerous character of the bridge, and the accident was due to his negligently raising his head too soon, his own negligence being the proximate cause of the injury. *Railroad Co. v. Hafner's adm'r*, 621.

24. *Railroads—Employees—Negligence of superior.*—A railroad company held liable for an injury to an engine hostler caused by the negligence of his superior, the yardmaster, in sending him forward with the engine on a track upon which the yardmaster had thrown some box cars in charge of a brakeman, although the negligence of such brakeman (his fellow servant) in bringing the cars too close to a switch on which such hostler is directed by his said superior to take the engine, contributed to the injury. *Railroad Co. v. Phelps*, 665.
25. *Employees—Contributory negligence—Obedience to orders.*—Where employee acts in obedience to orders he cannot be deemed guilty of contributory negligence, unless the danger be so glaring that no prudent man would encounter it, even when, like the employee, he was not entirely free to choose. *Railroad Co. v. Ward*, 687.
26. *Idem—Increased dangers—Liability of employers.*—Defendant had plaintiff employed in making excavations that demanded much caution. "Ground-hog holes" were dug eighteen inches wide and thirteen feet deep instead of six or eight feet deep as usual, with sides unsupported. "Boss," without examining as to the safety of the work, ordered plaintiff, who was unaware of the increased dangers thereof, to go in and dig the hole deeper. The sides caved in and disabled plaintiff for life: held, defendant is liable. *Idem*.
27. *Idem—Knowledge of danger—Burden of proof.*—The burden rests upon employer to prove that employee was aware of the increased dangers growing out of employer's negligence, and not out of the dangers incident to his ordinary employment. *Idem*.
28. *Railroads—Accident at crossing.*—Plaintiff's horse had calmly approached defendant's train as it passed very close to him, and after it passed, having safely cleared the track, homeward bound, became frightened at the steam from the same engine on its return, and backed the wagon against the train, whereby plaintiff was injured: held, defendant not liable, as it could not foresee such unusual conduct on the part of the horse. *Railroad Co. v. Yeamans*, 752.
29. *Carriers—Act of God—Liability.*—By the bursting of a water spout water accumulated in a fill in railroad track in larger quantity than could be carried off by the stone culvert built there thirty-five years before and always regarded as safe, causing a washout and break in the track, into which, during a dark, stormy night, the engine and

NEGLIGENCE—*Continued.*

some of the cars of a passenger train were precipitated, without any negligence on the part of the carrier, and thereby a passenger came to his death: *held*, carrier was not liable for the injury. *Railroad Co. v. Marshall's Adm'r*, 836.

NEGOTIABLE NOTES.

1. *Presentment and demand*.—A note payable at a bank is sufficiently presented to the endorser and last manager of the bank, at his residence after 5 P. M., where the bank had ceased to exist. *Waring v. Betts*, 46.
2. *Idem—Exhibition waived*.—If on demand of payment of such note, exhibition thereof is not asked for, and the person of whom demand is made, declines on other grounds, formal presentment by actual exhibition is waived. *Idem*.
3. *Failure of purpose—Case at bar*.—The bill avers that the note was delivered for one purpose and without the parties' consent, was used for a different purpose, and that *Solenberger v. Gilbert*, 86 Va., 778, rules the case: *Held*: The averment of fact is not sustained by the proof. *Ronald v. Bank of Princeton*, 813.
4. *Appellate court—Too late*.—Where for the first time the point is raised in this court that a promise in the note to pay, in case of a suit, five per cent collection fees and fifty dollars attorney's fee, is an unenforceable penalty within the ruling of *Rixey v. Pearre*, 89 Va., 113: *Held*: Too late now to raise the point. *Idem*.
5. *Destruction of negotiability*.—Conceding that such a promise might destroy the negotiability of the note, yet the averment that the note was delivered for the sole purpose of being discounted, not having been proved: *held*, such concession would avail the appellants nothing. *Idem*.

NEW TRIAL.

1. *Prohibition—Justices*.—A writ of prohibition will be granted to restrain a justice from allowing a new trial after more than thirty days after judgment, and to restrain defendant from proceeding after such new trial is allowed. *Burroughs v. Taylor*, 55.
2. *Indictment—Sale of liquor—Evidence*.—Indictment for unlawful sale of ardent spirits, charged that the offence was committed in a certain district where, under the local option law, "no license" prevailed. The evidence was that the defendant sold ardent spirits to witness in the county, but did not designate the district. Defendant moved to set aside the verdict of "guilty as charged in the indictment," and for a new trial; which motion was overruled: *held*, the motion should have been sustained. *Morgan's Case*, 80.

NEW TRIAL—*Continued.*

3. *Murder—Suspicion not proof.*—In case at bar : *held*, that though the facts certified in the record present strong grounds of suspicion against the prisoner, yet they are not sufficient to establish beyond a reasonable doubt the prisoner's guilt of the crime for which he stands indicted. *Tilley's Case*, 99.
4. *Verdict—Affidavits of jurors.*—The affidavits or declarations of jurors showing that they acted on evidence other than that adduced before them at the trial, cannot be used to impeach the verdict. *Taylor's Case*, 109.
5. *Misconduct of jury.*—Upon trial for murder, cartridge hulls found at the scene of the homicide have been introduced by the prosecution, and prisoner's Winchester rifle, with shells fired from it during the trial, has been introduced by him to show that the plunger struck the shells differently from those introduced by the prosecution ; and the jury were permitted, without objection, to take the rifle and shells to their room : *held*, it was not misconduct in the jury to take it apart and examine the plunger and ascertain that they have been recently tampered with and fixed so as to explode the cartridge differently from those put in evidence by the prosecution. *Idem*.
6. *Railroads—Fires—Damages.*—Verdict for \$1,600 for damages caused by fires set from locomotive will not be set aside as excessive where witnesses who examined the damage estimated it at more than twice that amount. *Railroad Company v. Draper*, 245.
7. *Newly discovered evidence.*—New trial on ground of newly discovered evidence will not be granted for evidence known before the trial, but omitted because the witnesses were believed to be hostile. *Idem*.
8. *Bill of exceptions.*—Where neither the facts nor the evidence is certified in the record, this court cannot review a decision of the trial court overruling a motion for a new trial. *Brown's Case*, 671.
9. *Conduct of jury—Absence of accused.*—A mere casual visit to scene of homicide by jury during recess whilst taking exercise under custody of officer in charge, in prisoner's absence, when there is no proof of prejudice, or of conversation regarding the scene, or of any influence on the jury thereby : *held*, no ground for setting aside the verdict. *Idem*.
10. *Exclusion of witness.*—Where after order of trial court that the witnesses be examined out of the hearing of each other, one not summoned, but present as a spectator, has heard part of the evidence, was called as witness for commonwealth : *held*, no ground for his exclusion. *Idem*.
11. *Evidence of another offence.*—Where on trial for murder prisoner had been, without objection, proven to have confessed that on night of homicide certain goods had been stolen, and a witness was allowed

NEW TRIAL—*Continued.*

to testify that those goods were found in prisoner's house when he was arrested for the homicide: *held*, as prisoner was not prejudiced by the testimony, its admission, though irregular, was not a reversible error. *Idem.*

NOTICE.

Latent equity.—It is the settled law that a *bona fide* purchaser of the legal title is not affected by any latent equity founded on a trust, fraud, or incumbrance, or otherwise, whereof he had not notice, actual or constructive. *State Bank of Va. v. Blanchard*, 23.

OPTIONS. (See *Contracts.*)PAROL EVIDENCE. (See *Evidence.*)

PARTITION OF LANDS.

1. *Interests of parties—Sale.*—An order for sale of land in partition before ascertaining the interests of the several parties, is premature and erroneous, as they are entitled to know how they stand in order that they may bid intelligently, if they desire to bid at the sale. *Stevens v. McCormick*, 735.
2. *Creditors.*—The creditors of the parties interested in the land are not proper parties in a partition suit. *Idem.*
3. *Commissioners.*—If from the facts in the record it appears that the land cannot be conveniently partitioned, there may be a decree for a sale, but it is not necessary that these facts shall appear from report of commissioners. *Idem.*
4. *Appeal—Decree of sale.*—Decree for sale of land in partition suit, though interlocutory, is appealable under Code, § 3454, as it requires change of title and possession, especially where it settles the principles of the cause. *Idem.*

PARTNERSHIP.

1. *Partners—Powers—General assignment.*—It is settled law that one partner has no implied authority to make a general assignment of the partnership effects for the benefit of creditors, unless his co-partner is absent or incapable of giving his assent or dissent. *Hill v. Postly*, 200.
2. *Dissolution—Contribution—Laches.*—A surviving partner who, after his co-partner leaves the State, takes possession of the assets, which are ample to pay the firm's indebtedness, and assumes control of the business, undertaking to close it up, and fails for thirty-four years to render any account, or make any claim against his co-partner or

PARTNERSHIP—*Continued.*

his estate for contribution for firm debts paid by him: *held*, precluded by his *laches* from claiming such contribution and *subjecting* his deceased partner's lands, in the hands of his *widow* and *children*, to the payment of a share of such *debts*. *Compton v. Thorn*, 653.

3. *Idem*—*Parties*.—Where in such case there was a third partner, also deceased, equally liable for the firm debts, in a suit for contribution by the surviving partner, *held*, the administrator and heirs of such third partner should be parties. *Idem*.

PASSENGERS. (See *Carriers*.)

PAYMENT.

1. *Tender*—*Presumption of payment*.—In 1862, a borrower executed bond and trust deed securing the loan to be repaid on or before April, 1864. The loan was in Confederate and such other paper and State currency as was then in circulation. In April, 1862, borrower tendered through his wife the money in Confederate notes to pay the bond. The tender was refused. On bill to enjoin sale under the trust deed in 1889: *held*, there was a valid tender in 1863, and by lapse of time a presumption of payment had arisen. *King v. King*, 177.
2. *Payment by note*.—Holder of note sending it to attorneys with instructions to renew, if possible, but otherwise to sue, and after judgment is obtained receiving from them new note and money, with intimation that if a small balance is soon paid they will receive it in satisfaction of the judgment, which holder accepts and announces the balance due, but doing nothing further for five years, thereby ratifies the act of the attorneys in endorsing the judgment as "satisfied." *Higginbotham v. May*, 233.
3. *Insurance*—*Payment of premiums*.—Where company charges premiums personally to the agent, who gives credit to the insurer: *held*, it amounts to payment. *Wytheville Ins. & Banking Co. v. Teiger*, 277.
4. *Idem*—*Apparent agent*—*Estoppel*.—When insurance company clothes a person with apparent authority to deliver policies and receive premiums: *held*, it is estopped, after policy is delivered to innocent holder, to set up a defence that the agent acted without written authority. *Idem*.
5. *Idem*—*Instructions*.—Plaintiff was insured against loss by fire by defendant, who delivered the policy to brokers who had placed for it many policies, remitting premiums at intervals. They delivered policy to plaintiff's agent without collecting premium. Afterwards, before the loss, plaintiff paid premium to agent, who paid brokers a sum which he testified included the premium, and took receipt

PAYMENT—*Continued.*

- "on account of miscellaneous companies." Policy provided that company should not be liable until premium actually paid. The trial court instructed that if the premium was embraced in the sum the agent paid the broker, the jury should find that the premium had been paid : *held*, no error. *Idem.*
6. *Personal representatives—Limitations.*—Balance in administrator's hands at settlement of his accounts was ordered in 1868 to be apportioned among the creditors, the amount to each being ascertained. In 1887 a creditor filed his bill to establish his claim against the administrator's sureties. On demurrer the bill was dismissed and never amended, nor the decision reversed. He then filed his petition in a lien suit pending against the administrator, asking that his debt be paid out of the fund : *held*, (1) The order, which was in effect a judgment, was barred in ten years. (2) The lapse of time raises the presumption of payment, and the *laches* are fatal. (3) The question having been decided and the suit dismissed, and no appeal taken, the question is *res judicata*. *White v. Offield*, 336.
7. *Laches—Loss of evidence—Limitation.*—Delay of twenty-six years in bringing suit to enforce a vendor's lien, where the delay is explained by the loss of the court records and the destruction of the creditor's books showing the existence of the lien : *held*, will not prevent a recovery. And there is no limitation to the life of such lien saving that arising from presumption of payment from lapse of time. *Ginter v. Breeden*, 565.
8. *Idem—Presumption of payment—Stay law.*—Where vendor's lien accrued in 1860, the stay law period must be excluded from the twenty years necessary to create the presumption of payment, and no such presumption had arisen when this suit was brought in 1888. *Idem.*

PENALTY.

Telegraph companies—Penalties—Inter-State commerce.—Code, § 1292, providing that every telegraph company shall deliver a telegram promptly to the person to whom it is addressed, and that for every failure to forward or deliver same as promptly as possible, the company shall forfeit \$100 to the person sending it, or to the person to whom it is addressed, *held*, not a burden upon, or a regulation of, commerce, and not in conflict with any act of Congress, or with the inter-state commerce clause of the United States Constitution ; and the action to enforce the forfeiture need not be in the name of the commonwealth. *Telegraph Co. v. Tyler*, 297.

PERSONAL REPRESENTATIVES.

1. *Executor—Commissions.*—Where executor settles his accounts by mistake not before the commissioner of the proper court, where the

PERSONAL REPRESENTATIVES—*Continued.*

whole matter is gone into in subsequent proceedings : *held*, no error to allow him compensation, though the accounts are not settled in time. *Moorman v. Crockett*, 185.

2. *Payment—Limitations.*—Balance in administrator's hands at settlement of his accounts was ordered in 1868 to be apportioned among the creditors, the amount to each being ascertained. In 1887 a creditor filed his bill to establish his claim against the administrator's sureties. On demurrer the bill was dismissed and never amended, nor the decision reversed. He then filed his petition in a lien suit pending against the administrator, asking that his debt be paid out of the fund : *held*, (1) The order, which was in effect a judgment, was barred in ten years. (2) The lapse of time raises the presumption of payment, and the laches are fatal. (3) The question having been decided and the suit dismissed, and no appeal taken, the question is *res judicata*. *White v. Offield*, 336.
3. *Appeal—Individual grievance.*—It is well settled that where an executor, *as such*, appeals from a decree which does not aggrieve the estate, the question cannot be considered whether he is aggrieved as an individual. *Swann, ex'or, v. Housman*, 816.

PLEADING.

1. *Declaration—Sufficiency.*—Where declaration details the facts of such killing, and alleges that at the time thereof the engine was under the management of such fireman, it is sufficient, and notifies the company that it will have to defend for failure to keep a competent engineer. *Railroad Co. v. Thomas' adm'r*, 205.
2. *Demurrer.*—Where a plea avers no injury to defendant from the fraudulent misrepresentation as to the lot referred to in it : *held*, a demurrer lies to the plea. *Lake v. Tyree*, 719.
3. *Nil debet—Payment.*—Under the plea of *nil debet* defendant cannot introduce evidence of payment or setoff, unless such payment or set-off be so plainly and particularly described in an account filed therewith, as to give plaintiff notice of its nature. *Richmond City, &c., Ry. Co. v. Johnson*, 775.

PRACTICE AT COMMON LAW.

1. *Waiver of objection.*—Where trial court ruled that certain admitted evidence was illegal and promised to hear later, a motion to exclude it, and no exception was taken, and there was a failure to call the court's attention before verdict, such failure amounts to a waiver of the objection. *Railroad Co. v. Anderson*, 1.
2. *Negligent killing—Sufficiency.*—Where declaration details the facts of such killing, and alleges that at the time thereof the engine was

PRACTICE AT COMMON LAW—*Continued.*

- under the management of such fireman, it is sufficient, and notifies the company that it will have to defend for failure to keep a competent engineer. *Railroad Co. v. Thomas' adm'r*, 205.
3. *Railroads—Fires—Damages.*—Verdict for \$1,600 for damages caused by fires set from locomotive will not be set aside as excessive where witnesses who examined the damage estimated it as more than twice that amount. *Railroad Co. v. Draper*, 245.
 4. *New trial.*—New trial on ground of newly discovered evidence will not be granted for evidence known before the trial, but omitted because the witnesses were believed to be hostile. *Idem.*
 5. *Employees—Risks—Instructions.*—In action by employee for personal injuries, it is not error to instruct that a servant entering upon dangerous employment assumes all incident risks, but not extraordinary risks arising from defective machinery, unless he has knowledge thereof, and chooses to remain in the employment. *Richlands Iron Co. v. Elkins*, 249.
 6. *Idem—Duty of employer.*—Nor is it error to instruct that it is employer's duty to use ordinary care to provide reasonably safe and suitable machinery, and that in absence of notice to the contrary, employee is warranted in assuming that employer has performed his duty in so providing. *Idem.*
 7. *Idem—Questions by jury.*—After instructions to jury and they have retired and returned and stated their inability to agree, it is not error to give them further instructions upon questions submitted by them and discussed by court and counsel for both parties in absence of the jury. *Idem.*
 8. *Alias writ.*—Where previous writs of summons have failed for ineffectual service or other irregularities, plaintiff is entitled to an alias writ. *Railroad Co. v. Brown*, 340.
 9. *Continuance.*—Where plaintiff is allowed to make at bar an immaterial amendment to his declaration : *held*, not error to refuse defendant a continuance on that ground. *Idem.*
 10. *Director—Acceptance—Defence.*—Where one is notified of his appointment as a director without declining it, and afterwards receives a summons for the company without remonstrating : *held*, his acceptance may be presumed, and it is no defence for the company that he, in the absence of collusion, failed to deliver the summons. *Idem.*
 11. *Error—Facts not certified.*—Where neither the evidence nor the facts are certified, this court cannot review a judgment setting aside a verdict and awarding a *venire de novo*. *Mallory v. Taylor*, 348.
 12. *Nonsuit—Not final judgment.*—By suffering a nonsuit, plaintiff ends his present suit without prejudice to his right to bring another ; and it is not a final judgment, but the opposite. *Idem.*

PRACTICE AT COMMON LAW—*Continued.*

13. *Action for injury—Declaration.*—In action against railroad company for the negligent killing of plaintiff's intestate, the declaration substantially averred that it was the duty of the company to have and maintain safe, sound, and suitable brakes to the cars on which the intestate was assigned to duty; that the company was guilty of negligence in suffering the brakes to the cars on which the intestate was employed at the time of his death to become so worn and broken as to be incapable of stopping the train as quickly as otherwise they would have done, and that the intestate's death resulted directly from this negligence on the part of the defendant company: *held*, the declaration is sufficient in law. *Beard's Adm'r v. Railroad Co.*, 351.
14. *Bill of exceptions.*—An entry in the order book that defendant excepted to a certain ruling of the trial court will not supply the place of a bill of exceptions. *Clark's Case*, 360.
15. *Continuance.*—Under the circumstances set forth in the opinion, *held*, not error to deny the motion for continuance. *Railroad Co. v. Humphreys*, 425.
16. *Demurrer to evidence.*—If the court would not set aside the verdict so finding the fact, that fact should be considered as established by the evidence demurred to. *Michael v. Roanoke Machine Works*, 492.
17. *Idem—Argument.*—It was not improper to allow counsel in discussing the amount of damages, to state to the jury that, so far as they were concerned, the demurrer to evidence was a practical admission of negligence on the defendant's part. *Idem*.
18. *Action on contract—Declaration.*—Where declaration in an action on such a contract, having set forth the same, alleges performance and acceptance of the work required thereby, and the refusal of the company to pay therefor, except on the estimates and certificates of its engineer made so plainly in violation of the terms and prices specified in the contract, as to amount to fraud: *held*, the declaration is sufficient in law. *Mills & Fairfax v. Railroad Co.*, 523.
19. *Joint action—Dismissal as to one.*—Where in action against two who file joint plea of *non assumpsit*, and plaintiff has the action dismissed as to one, and asks leave to amend his declaration as to the other, and there is nothing to show that the defence relied on was personal to the former: *held*, no error to refuse such leave. *Gibson v. Bere-ridge*, 696.
20. *Ejectment—Title of plaintiff.*—In order to recover the land sued for in ejectment, a good and sufficient title thereto must be shown in the plaintiff, who cannot recover on the defect of title in the defendant in possession. *McKinney v. Daniel*, 702.
21. *Pleading—Demurrer.*—Where a plea avers no injury to defendant from the fraudulent misrepresentation as to the lot referred to in it: *held*, a demurrer lies to the plea. *Lake v. Tyree*, 719.

PRACTICE AT COMMON LAW—*Continued.*

22. *Instructions—Burden of proof.*—In action on check given for price of land, there is a plea of *nil debet* and also a special plea of fraud in the sale, and the jury is instructed that the defendant must prove his special plea, but the plaintiff's duty to prove the case made in his declaration is ignored: *held*, such instruction works no injury to the defendant where it is given after the evidence relating exclusively to the special plea has been closed. *Idem.*
23. *Verdict—Judgment.*—Where in action of debt on a check, declaration demands a sum certain and interest, there is a verdict for "the amount of the debt in the declaration mentioned": *held*, the judgment may be for "the principal and charges of protest with interest thereon from the date of such protest." *Idem.*
24. *Ejectment—Verdict—Alteration.*—In action of ejectment jury found verdict for plaintiff for all the land claimed in his declaration. Judgment was entered thereon and the jury discharged. Defendant moved for a new trial. The court entered an order declaring it would grant a new trial unless plaintiff abated the verdict and took judgment for part of the land. Plaintiff abated as required: *held*, the court had no power to make the order. *Shiflet v. Dowell*, 745.
25. *Idem—Statutory provision.*—In suits for money it is the practice of the trial courts to put plaintiff on terms to abate merely excessive amounts found by the jury, but not so in ejectment because of Code, § 2746, prescribing what the verdict for land shall be. *Idem.*
26. *Slander—Repetition—Evidence.*—Under plea of not guilty in action for defamation, the defendant cannot introduce witnesses to prove that they heard the same slander. *Blackwell v. Landreth*, 748.
27. *Idem—Verdict—Costs.*—In such action the trial court had no power to enter judgment for five dollars only, where the verdict was for that sum and costs, but if the verdict was irregular, it should have been set aside and a new trial awarded. *Idem.*
28. *Idem—Inadequate damages.*—A verdict for five dollars and costs will be set aside as inadequate in action of slander of a girl of unblemished reputation by false imputations upon her chastity for the purpose of injuring an opposing candidate for office. *Idem.*
29. *Nil debet—Payment.*—Under plea of *nil debet* defendant cannot introduce evidence of payment or setoff, unless such payment or setoff be so plainly and particularly described in an account filed therewith as to give plaintiff notice of its nature. *Richmond City, &c., R'y Co. v. Johnson*, 775.

PRACTICE IN CHANCERY.

1. *Bill of Review—Errors of law—Appeal.*—If decree be erroneous in determining questions of fact, the only remedy is by appeal. Er-

PRACTICE IN CHANCERY—*Continued.*

- rors of law appearing on faces of decrees, orders, and proceedings arising on facts admitted by the pleadings, or stated as facts in the decree, may be corrected by bill of review. *State Bank of Va. v. Blanchard*, 22.
2. *Joinder of suits*.—A decree that land of a decedent is assets for the payment of the debts and of a deed of trust thereon duly executed and recorded, is proper in a suit to enforce the lien of the deed of trust, where the plaintiff, in another suit tried with it, fails to prove his title thereto claimed on the ground that he had paid for it in the decedent's lifetime, but had not received a conveyance of it. *Peebles v. Watts' Heirs*, 57.
 3. *Parties—Fraudulent conveyances*.—A suit to set aside a trust deed giving preference to creditors, as fraudulent, cannot be maintained without making the beneficiaries parties. *Simon v. Ellison*, 157.
 4. *Vendor's lien—Decree of sale*.—A portion of amount not being due, where the time when due is stated in a decree of sale to enforce a vendor's lien, does not render the decree erroneous. *Moore v. Green*, 181.
 5. *Idem—Decree for re-sale*.—If it be error to decree to plaintiff the right to recover on a vendor's lien for an amount not then due, such error will be cured by a decree for re-sale after the amount becomes due. *Idem*.
 6. *Jurisdiction—Decree*.—A recital in a decree that all the defendants had been duly summoned, is conclusive on appeal in the absence from the record of anything to the contrary. *Idem*.
 7. *Consolidation of suits*.—Two suits against same person, one against him as trustee, the other as executor, for claims payable out of same fund, involving the settlement of same transaction, distribution of same estate, the complainants to be affected *pro tanto* by the result of a suit for dower out of same estate: *held*, properly heard together. *Moorman v. Crockett*, 185.
 8. *Consolidation of causes* is a matter of discretion with the court below, and will not be disturbed, unless there was an abuse of discretion. *Hill v. Postley*, 200.
 9. *Demurrer to evidence—Joinder in*.—Where it would be the duty of the trial court to set aside a verdict in favor of the defendants: *held*, defendants may properly be compelled to join in a demurrer to the evidence. *Deaton v. Taylor*, 219.
 10. *Rehearing*.—A rehearing of suit for sale of lands after the sale has been made and confirmed, on the ground that one of the defendants had not been served with process, will not be allowed, although she testified positively that she was not served, and no trace of the case appears either on the process book or rule book, where the decree recites that process had been served on all the defendants

PRACTICE IN CHANCERY—*Continued.*

There are endorsements on the bill as if rules had been taken ; the deputy clerk testified that he issued process against her ; an order of publication containing her name was duly published in a newspaper ; the deputy sheriff testifies that he served process on her at her home, and returned it to the deputy clerk ; and one witness testifies that he had seen a summons for her which appeared to have been returned "executed." *Wohlford v. Trinkle*, 227.

11. *Answer*.—Code, § 3275, allows defendant to file his answer any time before final decree. In the case here, ten days after the rendition, by default, of a decree final in form, the defendants, during the same term, presented their answer to the bill, showing a probable title to the land in question ; but the court below refused to allow the answer to be filed solely on the ground that it "was presented too late": *held*, the ruling was error. *Buford v. North Roanoke L. & I. Co.*, 418.
12. *Cases compared*.—*Gerst v. Jones*, 32 Gratt., 528, distinguished from the case here. *Idem*.
13. *Commissioner's report—When not disturbed*.—A question of fact determined by commissioner upon contradictory evidence, and approved by lower court, cannot be disturbed on appeal, unless the error be palpable. *Magarity v. Succop's Adm'r*, 561.
14. *Setoffs*.—Defendant in creditors' suit cannot setoff notes placed in his hands for collection, if not collected to be returned to the owner, and which never became defendant's property. *Idem*.
15. *Partnership—Parties*.—Where in such case there was a third partner, also deceased, equally liable for the firm debts, in a suit for contribution by the surviving partner, *held*, the administrator and heirs of such third partner should be parties. *Compton v. Thorn*, 653.
16. *Injunction—Power of lower court*.—Judge of lower court has no power when the case is at rules and that court is not in term, to increase the bond upon an injunction granted by a judge of this court after its refusal by the lower court, and its return and recordation therein, although it becomes in effect an order of that court, which might be acted upon as such by that court in term. *Ruffin v. Commercial Bank*, 708.
17. *Idem—Collateral security*.—Where claim of adverse party is fully protected by collaterals, an order to increase an injunction bond, *held* error. *Idem*.
18. *Usury*.—To dismiss on the ground that the plaintiff has ample remedy at law, a bill filed under Code, § 2822, against lender to discover the amount of money actually lent, &c., and its interest, and if the interest was more than lawful, that the lender shall recover only the principal and pay the costs: *held*, error. *Idem*.
19. *Partition—Interests of parties—Sale*.—An order for sale of land in par-

PRACTICE IN CHANCERY—*Continued.*

- tition before ascertaining the interests of the several parties, is premature and erroneous, as they are entitled to know how they stand in order that they may bid intelligently, if they desire to bid at the sale. *Stevens v. McCormick*, 735.
20. *Idem*—*Creditors*.—The creditors of the parties interested in the land are not proper parties in a partition suit. *Idem*.
 21. *Idem*—*Commissioners*.—If from the facts in the record it appears that the land cannot be conveniently partitioned, there may be a decree for a sale, but it is not necessary that these facts shall appear from report of commissioners. *Idem*.
 22. *Appeal—Decree of sale*.—Decree for sale of land in partition suit, though interlocutory, is appealable under Code, § 3454, as it requires change of title and possession, especially where it settles the principles of the cause. *Idem*.
 23. *Judicial sales—Purchasers—Account of liens*.—Purchasers under decree should not be required to take or pay for the property where it had been thrice sold without an account of liens and the title is uncertain. *Etter v. Scott*, 762.
 24. *Idem—Rents and profits*.—Where the bill fails to allege, and it is not proved, that the rents and profits will not within five years discharge the liens, *held*, error to decree sale. *Idem*.
 25. *Idem—Previous sale*.—Purchasers at such sale should not be compelled to complete their purchase where the land has been previously sold in another suit, and neither the sale nor the decree therefor has been set aside. *Idem*.
 26. *Idem—Sale commissioner*.—Owner of half of the judgment, to satisfy which the suit is brought to sell land, *held* incompetent to act as commissioner to sell. *Idem*.
 27. *Answer—Withdrawal—Demurrer*.—Where there has been no unreasonable delay in making the motion, the court may, at its discretion, allow answer to be withdrawn and demurrer filed to the bill. *Weisinger v. Richmond Ice Machine Co.*, 795.
 28. *Case at bar*.—In the case here, the bill, as set forth in the opinion: *held*, bad on demurrer. *Idem*.
 29. *Irregularities—Waiver*.—A consent submission of a cause for hearing is a waiver of irregularities at rules. *Ronald v. Bank of Princeton*, 813.

PRINCIPAL AND AGENT.

1. *Payment of premiums*.—Where company charges premiums personally to the agent, who gives credit to the insurer, *held*, it amounts to payment. *Wytherville Ins. and Banking Co. v. Teiger*, 277.
2. *Idem—Apparent agent—Estoppel*.—When insurance company clothes a person with apparent authority to deliver policies and receive

PRINCIPAL AND AGENT—*Continued.*

- premiums : *held*, it is estopped, after policy is delivered to innocent holder, to set up a defence that the agent acted without written authority. *Idem*.
3. *Idem—Instructions—Payment.*—Plaintiff was insured against loss by fire by defendant, who delivered the policy to brokers who had placed for it many policies, remitting premiums at intervals. They delivered policy to plaintiff's agent without collecting premium. Afterwards, before the loss, plaintiff paid premium to agent, who paid brokers a sum which he testified included the premium, and took receipt "on account of miscellaneous companies." Policy provided that company should not be liable until premium actually paid. The trial court instructed that if the premium was embraced in the sum the agent paid the broker, the jury should find that the premium had been paid : *held*, no error. *Idem*.
 4. *Declarations of agent—Hearsay.*—Agent's admission binds principal only when made whilst the transaction is going on. If made afterwards, it is mere hearsay. *Lake v. Tyree*, 719.

PRINCIPAL AND SURETY.

1. *Release.*—Compromise between principal and obligee in bond signed by former and another, made in consideration of former's surrendering real estate to be immediately applied to the bond and in full discharge thereof : *held*, operates as a release of the other signer whether joint obligor or mere surety, whether such compromise be regarded as an absolute release, or as extending time of payment, or as taking new security. *Daniel's ex'or v. Wharton*, 584.
2. *Surety—Creditor—Collateral—Subrogation.*—A surety having paid the creditor a part of the debt, may recover from him the amount paid, where the creditor has, upon receiving from principal debtor the balance of the debt, surrendered to him without the knowledge or consent of the surety, the collateral security deposited with the creditor by the principal debtor. *Morton v. Dillon*, 592.

PROHIBITION, WRIT OF.

Justices—New trial.—A writ of prohibition will be granted to restrain a justice from allowing a new trial after more than thirty days after judgment, and to restrain defendant from proceeding after such new trial is allowed. *Burroughs v. Taylor*, 55.

PUBLIC ROADS.

1. *Appellate practice—Evidence not certified.*—On appeal from judgment of circuit court affirming judgment of county court confirming report of viewers in proceedings to open a road, awarding one dollar for

PUBLIC ROADS—*Continued.*

the taking of half an acre of land, where the evidence is not certified: *held*, such will be presumed to be the value of the land taken. *Tench v. Abshire*, 769.

2. *Report of viewers*.—Viewers report in proceedings to establish a road need not state width and grade of the road, especially where a diagram is returned with the report. *Idem*.
3. *Notice to land-owners—Appearance*.—Where all parties interested in the establishment of a road are either notified or appear and waive notice, no objection for want of notice can be made. *Idem*.
4. *Location of gates*.—Where order establishing road provides that the applicant shall erect and maintain gates at every point at which the road crosses the land owner's fence, such order is not defective for want of particularity. *Idem*.

PUBLIC SCHOOLS.

Constitution—Coupons—Taxes.—The coupons attached to the bonds issued under Acts March 30, 1871, and March 28, 1879, and expressed on their face to be receivable at and after maturity for *all* taxes, debts, dues, and demands due the State, evince an entire contract, incapable of separation; and such contract, being in violation of the constitutional provision in regard to setting apart the literary fund of the State for public school purposes in so far as it makes the school taxes payable in such coupons, (as decided by the U. S. Supreme Court in *Vashon v. Greenhow*, 135, U. S., 716), *held* wholly unconstitutional and void. *Commonwealth v. McCullough*, 597.

PURCHASERS.

1. *Judgments—Lands in another county*.—Purchase of land under decree in county wherein it lies, is not affected by constructive notice of judgment in another county which is not docketed in former county until after sale is confirmed and purchase-money paid, though title is retained. *Logan v. Pannill*, 11.
2. *Idem—Assignees*.—Judgment not docketed in county wherein land of the debtor lies, and is sold under decree in partition, does not, upon being docketed in said county, become a lien upon bonds for the purchase-money in hands of assignee who has no notice of the judgment, though title to the land was retained, and those bonds being personalty, and no execution had been issued. *Idem*.
3. *Purchasers for value without notice*.—A purchaser for value of property standing in the name of a partner, without notice to purchaser of any partnership, or that the assets thereof were used in buying, or improving it, is not affected by Code, § 2874, relating to limited partnerships. *State Bank of Va. v. Blanchard*, 23.

PURCHASERS—*Continued.*

4. *Latent equity.*—It is the settled law that a *bona fide* purchaser of the legal title is not affected by any latent equity founded on a trust, fraud, or incumbrance, or otherwise, whereof he had not notice, actual or constructive. *Idem.*

RAILROADS.

1. *Crossings—Contributory negligence.*—Where a person, after standing near a railroad crossing, attempts to cross and is run over by a train, which he might see or hear if he looks or listens, is guilty of such contributory negligence as will prevent a recovery for his death, notwithstanding negligence of defendant in failing to sound the whistle or ring the bell. *Hogan v. Tyler, receiver*, 19.
2. *Municipal subscriptions—Conditions precedent.*—City of Bristol is authorized by statute to subscribe and issue its bond for \$25,000 to the S. A. & O. railroad company: provided said statute shall not be in force until the company subscribed a certain sum to a furnace company. The railroad company merely procured a transfer to itself from the V. T. & C. railroad company of \$25,000 of stock in the furnace company; on which stock the S. A. & O. railroad company, being insolvent, did not even pay the assessments; *held*, the subscription of the said sum by the S. A. & O. railroad company to the furnace company was a condition precedent to the issue of the bonds of the city, with which such transfer was no compliance. *Echols v. City of Bristol*, 165.
3. *Railroad company—Negligent killing—Alter ego.*—An engineer, with the knowledge and permission of the conductor, who was the representative of the company, left his engine to be operated by an inexperienced fireman. Whilst making a flying switch, by the improper management of the engine by that fireman, the brakeman was killed; *held*, the company was liable. *Railroad Co. v. Thomas' adm'r*, 205.
4. *Declaration—Sufficiency.*—Where declaration details the fact of such killing, and alleges that at the time thereof the engine was under the management of such fireman, it is sufficient, and notifies the company that it will have to defend for failure to keep a competent engineer. *Idem.*
5. *Description.*—Boundary lines of lands conveyed to a railroad company should stand as fixed by the deeds, and not be shifted to meet any change of the track found necessary or desirable. *King v. Railroad Co.*, 210.
6. *Adverse possession.*—Railroad company's right of way to land conveyed to it under agreement with grantor that he might use any portion of it not needed by the company, he to yield possession whenever it should be needed by the company, is not affected by its

RAILROADS—*Continued.*

being unenclosed, vacant of buildings, or unoccupied at any time.
Idem.

7. *License—Duty of company.*—Where the public has been in the habit of crossing the railroad track on foot at a certain place for years without objection from the company: *held*, such acquiescence amounts to a license and imposes on the company the duty of taking reasonable care to avoiding injuring pedestrians. *Railroad Co. v. Wilson*, 263.
8. *Idem—Duty of persons crossing.*—Such pedestrians are bound to take ordinary precautions for their own safety, even if there was any negligence on the company's part. *Idem.*
9. *Idem—Injury to persons on the track.*—On crossing railroad at a place where the public is licensed to cross, who knowing that he is on one of the main tracks over which trains pass at all hours, fixes his attention upon a train on the other track which he has changed his course to avoid, and takes no precautions in looking out for trains upon the track on which he is walking, is guilty of such negligence as defeats his recovery for injuries from being struck by such train.
Idem.
10. *Employees—Injuries—Contributory negligence—Disobedience.*—Where, contrary to rules, conductor allowed cars to be shifted and run down grade without an engine to control them, and whilst he was between the cars, a brakeman, without objection from the conductor, caused another car to run down the same way, which, by reason of defective brakes, could not be controlled, and struck the first-named cars with such violence that the conductor was injured: *held*, the conductor cannot recover on account of his own negligence and disobedience of the rules. *Railroad Co. v. Dudley*, 304.
11. *Idem—Presumption.*—Railroad companies are entitled to presume that cars delivered to them by connecting companies are in proper condition. *Idem.*
12. *Idem—Failure to inspect.*—Conductors who are required by the rules to inspect all cars picked up in transit, cannot recover for injuries received by them by reason of their failure to inspect such cars. *Idem.*
13. *Negligent injury—Licensee.*—Where one has been notified by defendant company that certain freight has arrived for him at its depot, and whilst walking along the passage to the freight room he is injured by several carelessly piled boxes of iron falling on him: *held*, he is a licensee, and the company is liable in damages. *Railroad Co. v. Brown*, 340.
14. *Carriers—Detention of cars—"Demurrage."*—A railroad company may make a reasonable charge for delay in unloading cars after notice of arrival to the consignee, and such charge is not for transportation, storage or delivery of freight within Code, §§ 1202, 1203, which

RAILROADS—*Continued.*

- declare that no charge other than that provided by law shall be made. *Railroad Co. v. Adams, &c.*, 393.
15. *Idem.*—A charge to a consignee of one dollar a day after three days for every car remaining unloaded after notice of arrival: *held*, not unreasonable. *Idem.*
 16. *Employees—Contributory negligence.*—Brakeman, side-tracking flat car, train having backed into siding, cut car loose, and signalled train to leave it. Car not clearing main track he signalled train to return and push it further. Train returning fast, he put one foot between iron rails loaded on car, and end of car, and other foot outside, so as to set brake. Train struck car and rails slipped forward and crushed his foot: *held*, brakeman's negligent acts caused the accident, and he is not entitled to recover. *Railroad Co. v. De Butts*, 405.
 17. *Trespass—Liability.*—Railroad company, without authority, erected expensive improvements on plaintiff's land. Becoming insolvent, its franchises and property were purchased by another company: *held*, the purchaser is liable for the land taken without considering the benefit from the construction of the railroad, and for the damage to the residue of the land. *Railroad Co. v. Humphreys*, 425.
 18. *Idem—Measure of damages—Evidence.*—In such cases: *held*, the amount of the damages, as respects the residue of the land, is the difference in the market value of the land before and after the taking thereof; and as respects the land taken, including said improvements, is the fair cash market value of the land and said improvements at the time of the taking in view of the uses to which they have been put; and it was not error to refuse to allow a witness to testify that he had donated similar property to the company. *Idem.*
 19. *Injury to stock—Failure to fence.*—Where railroad company failed to fence its right of way along enclosed lands as required by Code, section 1258, in an action for stock killed on its track at a place not fenced as required: *held*, the company not allowed to prove that there was a lawful fence at said place erected by the land-owners, and that therefore it was not liable for the injury done there to the stock. *Railroad Co. v. McGavock's adm'rs*, 507.
 20. *Burden of proof.*—LACY, J., *dissenting*, contended that "the effect of Code, § 1261, is to shift the burden of proving negligence from the plaintiff and place on the company the burden of proving the negative of this proposition." *Idem.*
 21. *Brakeman—Low bridge.*—Such company is not liable for the death of brakeman who was struck by the fourth sill of a dangerously low bridge after he had passed safely under the three first sills by stooping and lowering his head, when he had full knowledge of the dan-

RAILROADS—*Continued.*

- gerous character of the bridge, and the accident was due to his negligently raising his head too soon, his own negligence being the proximate cause of the injury. *Railroad Co. v. Hafner's adm'r*, 621.
22. *Employees—Negligence of superior.*—A railroad company held liable for an injury to an engine hostler caused by the negligence of his superior, the yardmaster, in sending him forward with the engine on a track upon which the yardmaster had thrown some box cars in charge of a brakeman, although the negligence of such brakeman (his fellow servant) in bringing the cars too close to a switch on which such hostler is directed by his said superior to take the engine, contributed to the injury. *Railroad Co. v. Phelps*, 665.
23. *Accident at crossing.*—Plaintiff's horse had calmly approached defendant's train as it passed very close to him, and after it passed, having safely cleared the track, homeward bound, became frightened at the steam from the same engine on its return, and backed the wagon against the train, whereby plaintiff was injured: held, defendant not liable, as it could not foresee such unusual conduct on the part of the horse. *Railroad Co. v. Yeamans*, 752.

REBELLION.

City council—Notes as currency.—Under an ordinance in 1861, city of Richmond issued notes to circulate as currency. Evidence showed that one object was to aid the rebellion: held, the notes were void. *Isaacs, &c., v. City of Richmond*, 30.

RECORD.

1. *Criminal proceedings.*—There need not be set out in the record the writ of *venire facias* for the trial jury in a criminal prosecution. *Combs' Case*, 88.
2. *Venire facias.*—It appearing that the *venire* was issued by order of the trial court: held, no error that it is not made part of the record. *Taylor's Case*, 109.
3. *Judgment.*—A writ of error will not lie where the record does not show the judgment of the trial court, but merely recites that judgment was entered. *Read's Case*, 168.
4. *Appellate court—Review.*—As the clerk can add nothing to the record, agreed facts copied by him in the record and certified as the facts, whereon the judgment rested, cannot be considered here and the case cannot be reviewed in the absence of a bill of exceptions to the supposed errors of the trial court. *Johnson v. Norton Land and Improvement Co.*, 267.
5. *Idem—Depositions.*—Nor is a deposition a part of the record in the absence of a bill of exceptions, though copied in the transcript and certified by the trial court and clerk. *Idem*.

REGISTRY LAWS.

1. *Conditional sales—Void unless recorded.*—A conditional sale of goods reserving title to seller is void as to creditors of, and purchasers from, purchaser without notice, unless recorded. *Callahan v. Young, Clerk*, 574.
2. *Idem—When to be recorded.*—Clerk is required to admit to record a writing as to any person whose name is signed thereto, when same has been acknowledged by him, or proved as to him by two witnesses in court or before clerk in his office.
3. *Idem—Memorandum.*—Acts 1889-'90, p. 108, amending Code, § 2462, provides that clerk shall from the original contract, docket and index a memorandum setting forth the date thereof, the amount due therein, and a brief description of the goods, and that such docketing and indexing shall have the same effect as if the contract were recorded according to Code 1887, chapter 109. *Idem*.
4. *Mandamus.*—In the case here, *held*, a *mandamus* will not be awarded to compel the clerk to docket and index such memorandum unless the original contract has been produced before him and proved or acknowledged as prescribed by law. *Idem*.

REHEARING. (See *Practice in Chancery*.)

RELEASE.

1. *Contract—Parol evidence.*—Plaintiff by writing agreed to furnish defendant with railroad ties at points where needed, but alleged a contemporaneous parol agreement of defendant to haul part of the ties. In action for defendant's failure to perform the parol agreement: *held*, such agreement could not be proved as it would violate the rule which forbids the admission of parol evidence to vary a written agreement. *Scott v. Railroad Co.*, 241.
2. *Idem—Receipt.*—Plaintiff accepted payment and receipted in full of all demands under the contract for such ties as he hauled: *held*, such receipt was a complete defence to the plaintiff's action. *Idem*.

RES ADJUDICATA.

1. *Personal representatives—Payment—Limitations.*—Balance in administrator's hands at settlement of his accounts was ordered in 1868 to be apportioned among the creditors, the amount to each being ascertained. In 1887 a creditor filed his bill to establish his claim against the administrator's sureties. On demurrer the bill was dismissed and never amended, nor the decision reversed. He then filed his petition in a lien suit pending against the administrator, asking that his debt be paid out of the fund: *held*, (1) The order, which was in effect a judgment, was barred in ten years. (2) The lapse of time

RES ADJUDICATA—*Continued.*

- raises the presumption of payment, and the laches are fatal. (3) The question having been decided and the suit dismissed, and no appeal taken, the question is *res judicata*. *White v. Offield*, 336.
2. *Appellate court—Decision—Conclusiveness.*—Whatever is contained in the record on an appeal is supposed to have been passed upon, and whatever is passed upon here, and whatever might have been passed upon, in consideration of the record, is concluded and settled, and cannot be reopened by the lower court. *Krise v. Ryan*, 711.

RESULTING TRUSTS.

1. *Married women—Estoppel.*—A married woman is not estopped from claiming as against her husband's creditors, a resulting trust in land paid for by her father and intended to be hers, but deeded to her husband by his collusion with the grantor, by reason of the failure of her father and herself to take positive action during his lifetime, if she did not then know how the title stood, nor what her father's intentions were, and did assert her title before it was assailed. *Steagall v. Steagall*, 73.
2. *Equitable relief.*—Equity hath exclusive jurisdiction where plaintiffs claim that land was bought with funds of their ancestors' estate by his administrator, who took the title in his own name, and afterwards listed it in his schedules in bankruptcy, but with a declaration of the said trust written therein, which affected with notice the purchasers of the land under the bankrupt proceedings. *Moorman v. Arthur*, 455.
3. *Idem—Evidence.*—In the case here, *held*, that though parol testimony is admissible to establish a resulting trust against the letter of a deed, yet the trust must be proved, as alleged, by clear, cogent, and explicit evidence; and that the evidence adduced to establish the trust claimed by the plaintiffs, is not such, but on the contrary, is conflicting, improbable, and insufficient. *Idem*.
4. *Distributees—Creditors.*—Where administrator converts his intestate's personalty into real estate, a trust will result therein for the benefit of his widow as to one-third, and his children as to the residue; but his creditors may, through a court of equity, subject the real estate to the payment of their debts, if the personalty was liable therefor. *Idem*.

SALES.

- Mashie v. Ford*,
284
1. *Tax sale.*—The validity of a sale of land delinquent for non-payment of taxes, which is regular on its face, cannot be assailed collaterally.
2. *Rescission—Fraud—Evidence.*—Vendor sued to rescind sale of land on the ground that vendee misrepresented his ability to pay. Vendor

SALES—*Continued.*

- was informed that vendee expected certain money. After the sale, but before vendee was put into possession, he told the former he was disappointed in his expectation. The cash payment was made, but not so the deferred payments. The vendor knowing the vendee's disappointment, sought to enforce the contract. There was no evidence of fraudulent representations, though present insolvency was proved: *held*, vendor was not entitled to rescind the sale, his remedy being to ask for specific performance and sale of the land. *Chase v. Miller*, 323.
3. *Bankruptcy—Validity.*—Where land is sold under proceedings in bankruptcy, persons interested in the land, but not parties, are not bound by the sale, though the bankrupt was the administrator of the estate through which they claim. *Moorman v. Arthur*, 455.
 4. *Conditional sales—Void unless recorded.*—A conditional sale of goods reserving title to seller is void as to creditors of, and purchasers from, purchaser without notice unless recorded. *Callahan v. Young, Clerk*, 574.
 6. *Idem—When to be recorded.*—Clerk is required to admit to record a writing as to any person whose name is signed thereto, when same has been acknowledged by him, or proved as to him by two witnesses in court or before clerk in his office. *Idem*.
 6. *Idem—Memorandum.*—Acts 1889-'90, p. 108, amending Code, § 2462, provides that clerk shall from the original contract, docket and index a memorandum setting forth the date thereof, the amount due therein and a brief description of the goods, and that such docketing and indexing shall have the same effect as if the contract were recorded according to Code 1887, chapter 109. *Idem*.
 7. *Mandamus.*—In the case here: *held*, a *mandamus* will not be awarded to compel the clerk to docket and index such memorandum unless the original contract has been produced before him and proved or acknowledged as prescribed by law. *Idem*.
 8. *Sales for taxes—Ex collector.*—Where power to sell land for taxes is given by a city charter to the city collector: *held*, such power ceases with his official term and a sale made by him after cessation of his term, is void. *McCullough v. Hunter*, 699.
 9. *Mandamus—Treasurer—Deed.*—Where sale of land for taxes is made by an ex-collector, *mandamus* will not lie to compel the city treasurer to make a deed conveying the land to the purchaser. *Idem*.
 10. *Warranty in catalogue—Breach—Damages.*—Where defendant is induced to buy wagons by warranty in plaintiff's catalogue, that they were well made of good, thoroughly-seasoned material, and strong enough to carry the weight mentioned in catalogue: *held*, that he is entitled to rely thereon and to recover damages for any breach thereof, though his order was on plaintiff's form covenanting that

SALES—*Continued.*

if any breakage occurred within a year from defective material or workmanship, the same should be repaired without cost on production at the factory of the broken or defective parts, and though such parts were not produced there. *Milburn Wagon Co. v. Nisewarner*, 714.

11. *Sale of land—Misrepresentations—Opinions.*—In order to support action of deceit, or suit in equity for rescision, misrepresentations must be of a material fact inducing the purchase, and on which purchaser has a right to rely, and did rely, and whereby he was actually misled to his injury. But representations that lots sold are "good building lots, and valuable," are mere expression of opinions not constituting actionable fraud, where there is no intent to defraud, and seller uses no artifice to prevent him from making inquiries or examinations as to the lots, and they are at hand and accessible. *Lake v. Tyree*, 719.
12. *Idem.*—Plaintiff induced defendant to buy certain lots by representing them to be level and suitable for building on. Neither had ever seen them. Same day defendant found the lots deeply gullied—one thirty feet below level of street, the other on a steep declivity. Seeing this, he demanded his check given for the price. Plaintiff used no artifice to prevent defendant from examining the lots, which were accessible: *held*, the defendant is without remedy. *Idem.*

SEPARATE ESTATE.

1. *Married women—Trust deed.*—A deed of trust executed by a married woman and her trustee on her equitable separate estate in land, her husband not joining in the deed, is void. *Taylor v. Cussen*, 40.
2. *Idem—Rents and profits.*—Such trust deed is not an incumbrance on the rents and profits of such estate where it does not appear that the loan secured by the deed was for her benefit, and where her intention was to create a *specific lien* on the estate. *Idem.*
3. *Husband—Estoppel.*—Where husband was not guilty of any fraud, actual or constructive, in negotiating the loan, he is not estopped from denying the validity of such deed. *Idem.*
4. *Married women—Transfer.*—A debt secured by trust deed on land, became, under the creditor's will, the separate property of a married woman, with whose knowledge and consent it was settled with her husband in the purchase of land that was conveyed to her and yet remains hers. Subsequently the bond of matrimony between them was annulled, but the rights of property were left by the decree as they stood at its date. Afterwards she claimed the debt as her property and as unpaid, alleging her ignorance of her rights under act of April 4, 1877, at the time of the settlement. By her direction

SEPARATE ESTATE—*Continued.*

the trustee advertised the land for sale under the trust deed. The debtor obtained an injunction to the sale: *held*:

1. Under that act a married woman may give her separate estate to her husband, and her ignorance of the law does not invalidate the transaction.
2. The rights of property between them because *res judicata* by the decree of divorce.
3. The injunction was rightly perpetuated, as the debt has been paid, and the grantor in the trust deed is entitled to have it released. *Osborn v. Throckmorton*, 311.

SETOFFS.

Defendant in creditors' suit cannot setoff notes placed in his hands for collection, and if not collected to be returned to the owner, and which never became defendant's property. *Magarity v. Succop's adm'r*, 561.

SETTLEMENTS.

1. *Husband and wife—Postnuptial settlement.*—Such settlements presumed voluntary. Burden of proving valuable consideration on those claiming under them. As against his creditors neither he nor she is competent to testify, nor are his verbal or written declarations admissible in support of the settlements. *Massey v. Yancy*, 626.
2. *Idem—Transfer of stock.*—As against creditor of husband garnisheeing stock, his assignment to his wife endorsed upon the certificate, and reciting that it is for value received: *held*, not a valid transfer thereof in a case where the evidence shows that he had subscribed for it, that it always stood in his name, and the company's books evinced no transfer and no payment of the transfer fee; that payment of monthly dues was always by his checks; that recently before the garnishment he had presided at a meeting of the stockholders and mentioned no assignment or proxy; that she had no separate estate and never laid claim to the stock before filing the interpleader. *Idem*.
3. *Ante-nuptial settlements.*—Prior to May 1, 1888, deed from a man to his intended wife in consideration of marriage, was valid as against his creditors in the absence of fraudulent intent on her part. *Moore v. Buller*, 683.
4. *Idem—Evidence.*—In suit by creditors to annul deed made before May 1, 1888, in consideration of marriage by a man to his intended wife, it appeared that grantor was at its date insolvent, and had recently bought considerable property on credit, and the deed would leave his creditors unpaid; that before the marriage notice was

SETTLEMENTS—*Continued.*

served on her of such suspicious circumstances; that the commissioner who heard the witnesses, reported that there was no proof of her fraudulent participation, and the report was confirmed: *held*, the deed must be allowed to stand. *Idem.*

SLÂNDER. (*See Libel and Slander.*)

SPECIFIC PERFORMANCE. (*See Contracts.*)

STATE BONDS.

1. *Appellate court—Jurisdiction—Coupons.*—This court hath jurisdiction on appeal, of an action necessarily involving the validity of coupons cut from bonds issued under Acts March 30, 1871, and March 28, 1879, relating to the funding and payment of the public debt, and offered in payment of taxes, although less than the jurisdictional minimum is involved, as the validity of those acts is brought in question. *Com'lh v. McCullough*, 597.
2. *Constitution—Coupons—Taxes—Schools.*—The coupons attached to the bonds issued under Acts March 30, 1871, and March 28, 1879, and expressed on their face to be receivable at and after maturity for *all* taxes, debts, dues, and demands due the State, evince an entire contract, incapable of separation; and such contract, being in violation of the constitutional provision in regard to setting apart the literary fund of the State for public school purposes in so far as it makes the school taxes payable in such coupons, (as decided by the U. S. Supreme Court in *Vashon v. Greenhow*, 135 U. S., 716): *held*, wholly unconstitutional and void. *Idem.*

STATUTE OF LIMITATION.

1. *Personal representatives—Payment.*—Balance in administrator's hands at settlement of his accounts was ordered in 1868 to be apportioned among the creditors, the amount to each being ascertained. In 1887 a creditor filed his bill to establish his claim against the administrator's sureties. On demurrer the bill was dismissed and never amended, nor the decision reversed. He then filed his petition in a lien suit pending against the administrator, asking that his debt be paid out of the fund: *held*, (1) The order, which was in effect a judgment, was barred in ten years. (2) The lapse of time raises the presumption of payment, and the laches are fatal. (3) The question having been decided and the suit dismissed, and no appeal taken, the question is *res judicata*. *White v. Ofield*, 336.
2. *Laches.*—The federal statute limiting actions by or against assignees in bankruptcy as to property vested in them to two years, applies

STATUTE OF LIMITATION—*Continued.*

not to suits against purchasers from such assignees. Nor can the claims of persons to said property be barred by *laches* so long as they are ignorant of their rights. *Moorman v. Arthur*, 455.

3. *Limitation of action—Maturity of obligation.*—Suit on note made payable on its face "one day after date out of proceeds of sale of furnace," not brought within five years after maker has realized from such sale more than enough to pay the note, *held*, barred by limitation. *Sayers v. Sayers*, 755.

STOCK.

Subscriptions. (*See Corporations.*)

SUBROGATION.

Surety—Creditors—Collateral.—A surety having paid the creditor a part of the debt, may recover from him the amount paid, where the creditor has, upon receiving from principal debtor the balance of the debt, surrendered to him without the knowledge or consent of the surety, the collateral security deposited with the creditor by the principal debtor. *Morton v. Dillon*, 592.

SUBSCRIPTIONS. (*See Railroads; Corporations; Municipal Corporations.*)

SUPPLIES.

1. *Constitutional law—Special legislation.*—Code § 2486 giving liens to persons furnishing supplies to a manufacturing corporation on all its property, superior to deeds of trust, &c., executed since March 21, 1877, is not contrary to amendment 14 to the constitution of the U. S. as being special and class legislation. *Va. Devel. Co. v. Crozer Iron Co.*, 126.
2. *Construction of statutes.*—Liens for supplies given, by § 2485, priority over deeds of trust, &c., executed since March 21, 1877, are not restricted to deeds of trust, &c., executed between that date and the date of the taking effect of that act, but have precedence over deeds of trust, &c., executed after the latter date. *Idem.*
3. *Vested rights—Impairment of charter.*—Section 2485 giving prior liens upon the property of manufacturing corporations for supplies is not invalid as impairing the charter right of such corporation to issue its bonds and secure them, as the charter was taken subject to the general law of the State, and such changes as might be made in the law. *Idem.*
4. *General laws—Private acts—Acts of incorporation.*—Section 4203 excluding from operation of the Code any act passed by the legislature between March 15, 1887, and May 1, 1888, applies only to the

SUPPLIES—*Continued.*

acts of a general nature and not to acts of incorporation, which are private acts. *Idem.*

5. *Supplies*—*What are under § 2485.*—Pig iron furnished a rolling mill, whose business is to manufacture iron, steel, and other metals, is "a supply" within the meaning of § 2485, giving a lien to all persons furnishing fuel and other supplies necessary to the operation of any manufacturing company. *Idem.*
6. *Liens for materials*—*Priority.*—Liens given by § 2485 are entitled to precedence as among themselves according to the times at which they are severally filed under § 2486, that first filed taking preference. *Idem.*

TAXES.

1. *Constitution*—*Coupons*—*Schools.*—The coupons attached to the bonds issued under Acts March 30, 1871, and March 28, 1879, and expressed on their face to be receivable at and after maturity for *all taxes*, debts, dues, and demands due the State, evince an entire contract, incapable of separation; and such contract, being in violation of the constitutional provision in regard to setting apart the literary fund of the State for public school purposes in so far as it makes the school taxes payable in such coupons (as decided by the U. S. Supreme Court in *Vashon v. Greenhow*, 135 U. S., 716): *held*, wholly unconstitutional and void. *Commonwealth v. McCullough*, 597.
2. *Sales for taxes*—*Ex-collector.*—Where power to sell land for taxes is given by a city charter to the city collector, *held*, such power ceases with his official term and a sale made by him after cessation of his term, is void. *McCullough v. Hunter*, 699.
3. *Mandamus*—*Treasurer*—*Deed.*—Where sale of land for taxes is made by an ex-collector, *mandamus* will not lie to compel the city treasurer to make a deed conveying the land to the purchaser. *Idem.*
4. *Capital stock*—*Shares*—*Double taxation.*—The capital stock and the shares of the capital stock are distinct things, the former belonging to the corporation and the latter to individuals. Both may be taxed, and it is not double taxation. *Commonwealth v. Charlottesville P. B. & L. Co.*, 790.
5. *Construction of statutes*—*Non-residents.*—Acts 1889-90, p. 201, § 8, sub-section 2, taxing "capital, including moneys, &c.," and sub-section 3 thereof, taxing "the value of all capital of incorporated joint stock companies not otherwise taxed: *held*, to authorize the taxation of the capital stock of such companies, not otherwise taxed, as well as the shares in the hands of the stockholders of the companies; as the word "capital" in the former sub-section signifies money or other thing invested, including such shares, whilst in the latter it signifies the capital stock paid in to conduct the business; and that

TAXES—Continued.

the words "capital not otherwise taxed," in the latter, is not confined to the holdings of non-resident or otherwise inaccessible stockholders. *Idem*.

TAX SALES.

The validity of a sale of land delinquent for non-payment of taxes, which is regular on its face, cannot be assailed collaterally. *Machir v. Funk*, 284.

TELEGRAPH COMPANIES.

Penalties—Inter-State commerce.—Code, § 1292, providing that every telegraph company shall deliver a telegram promptly to the person to whom it is addressed, and that for every failure to forward or deliver same as promptly as possible, the company shall forfeit \$100 to the person sending it, or to the person to whom it is addressed: *held*, not a burden upon, or a regulation of, commerce, and not in conflict with any act of Congress, or with the inter-state commerce clause of the United States Constitution; and the action to enforce the forfeiture need not be in the name of the commonwealth. *Telegraph Co. v. Tyler*, 297; *Telegraph Co. v. Bright*, 778.

TRESPASS.

- 1 *Railroads—Liability.*—Railroad company, without authority, erected expensive improvements on plaintiff's land. Becoming insolvent, its franchises and property were purchased by another company: *held*, the purchaser is liable for the land taken without considering the benefit from the construction of the railroad, and for the damage to the residue of the land. *Railroad Co. v. Humphreys*, 425.
2. *Idem—Measure of damages—Evidence.*—In such case: *held*, the amount of the damages, as respects the residue of the land, is the difference in the market value of the land before and after the taking thereof; and as respects the land taken, including said improvements, is the fair cash market value of the land and said improvements at the time of the taking, in view of the uses to which they have been put; and it was not error to refuse to allow a witness to testify that he had donated similar property to the company. *Idem*.

TRUSTEE.

1. *Removal.*—A trustee, though insolvent and in arrears for a small amount when suit is brought, which arrears are subsequently paid, and where the beneficiary is entitled to the interest only during her life, and the investment is good and the sureties are solvent, will not be removed. *Moorman v. Crockett*, 185.

TRUSTEE—*Continued.*

2. *Trust deed—Place of sale.*—Where sale shall be made lies in the trustee's discretion in case the deed does not name the place; but if either party disapproves his decision, he should, before the sale, apply to the court for instructions. *Morris v. State Ins. Co.*, 370.
3. *Idem.*—Where property on outskirts of Richmond was to be sold under a trust deed naming no place of sale, trustee selected the city hall, to which the debtor objected, that it would sell higher on the premises: *held*, the debtor's wishes should govern. *Idem.*
4. *Idem—Sale in parcels—Injunction.*—Deed not prescribing sale by parcels must be construed by the statute requiring, in case of default, the trustee "to sell the property conveyed by the deed, or so much thereof as may be necessary": *held*, if it will sell higher by parcels, and the owner requests such sale, and trustee refuses, a court of equity will intervene. *Idem.*
5. *Idem—Personal confidence.*—The trustee must act in person, and not by agent. *Idem.*

USURY.

Chancery practice.—To dismiss on the ground that the plaintiff has ample remedy at law, a bill filed under Code, § 2822, against lender to discover the amount of money actually lent, &c., and its interest, and if the interest was more than lawful, that the lender shall recover only the principal and pay the costs: *held*, error. *Ruffin v. Commercial Bank*, 708.

VENDOR'S LIEN.

1. *Decree of sale.*—A portion of amount not being due, where the time when due is stated in a decree of sale to enforce a vendor's lien, does not render the decree erroneous. *Moore v. Green*, 181.
2. *Decree for re-sale.*—If it be error to decree to plaintiff the right to recover on a vendor's lien for an amount not then due, such error will be cured by a decree for re-sale after the amount becomes due. *Idem.*
3. *Laches—Loss of evidence—Limitation.*—Delay of twenty-six years in bringing suit to enforce a vendor's lien, where the delay is explained by the loss of the court records and the destruction of the creditor's books showing the existence of the lien: *held*, will not prevent a recovery. And there is no limitation to the life of such lien saving that arising from presumption of payment from lapse of time. *Ginter v. Breeden*, 565.
4. *Idem—Presumption of payment—Stay law.*—Where vendor's lien accrued in 1860, the stay law period must be excluded from the twenty years necessary to create the presumption of payment, and

VENDOR'S LIEN—*Continued.*

no such presumption had arisen when this suit was brought in 1888.
Idem.

5. *Exchange of lands.*—In 1859, by written contract, H. and B. exchanged lands, B. giving bonds for boot. H. sold his tract to G. and I., taking their bonds. No conveyance. H. assigned some of the bonds to plaintiff. Then H., G., I., and B.'s widow essayed to annul the exchange, the sale, and the bonds. H. took his former land back, and sold it to L. on condition he would assume payment of B.'s bonds, and the widow took possession of B.'s former land; but no care was taken of the assignee's interests: *held*, the assignee can subject H.'s former land to the lien of B.'s bonds, and B.'s former land to the lien of the bonds of G. and I. *Idem.*

VENIRE FACIAS. (*See Criminal Jurisdiction and Proceedings.*)

VERDICT.

1. *Affidavits of jurors.*—The affidavits or declarations of jurors showing that they acted on evidence other than that adduced before them at the trial, cannot be used to impeach the verdict. *Taylor's Case*, 109.
2. *Excessive damages.*—A verdict of \$2,500 for an injury to an employee—breaking his skull so that a part has to be removed, leaving the brain unprotected—by which his capacity to work is very much impaired: *held*, not excessive. *Richlands Iron Co. v. Elkins*, 249.

WARRANTY.

1. *Insurance.*—A warranty is an agreement in the nature of a condition precedent, and like that must be strictly complied with, whether material or not. *Va. F. & M. Ins. Co. v. Morgan*, 290.
2. *Idem—Conditions—Iron safe clause.*—In application for policy of fire insurance, insured was asked if he would keep his account books in an iron safe, or secure in another building. He answered in the affirmative: *held*, the statement was a warranty. *Idem.*
3. *Sales—Breach—Damages.*—Where defendant is induced to buy wagons by warranty in plaintiff's catalogue, that they were well made of good, thoroughly-seasoned material, and strong enough to carry the weight mentioned in catalogue: *held*, that he is entitled to rely thereon and to recover damages for any breach thereof, though his order was on plaintiff's form covenanting that if any breakage occurred within a year from defective material or workmanship, the same should be repaired without cost on production at the factory of the broken or defective parts, and though such parts were not produced there. *Milburn Wagon Co. v. Nisewarner*, 714.

WATER COMPANIES.

Powers—Meters.—The charter of a water company provides that all water rates shall be uniform throughout the city for the same class of service, and designates special charges for hydrants, but also provides that the charge shall not exceed a certain sum per hundred gallons for the amount supplied: *held*, the company may use either the hydrant as a means of charge or any other reliable instrument which will measure the quantity used, and charge some of its customers by the gallon, and at the same time charge others by the hydrant, though it cannot lawfully discriminate between water taxes of the same class. *Exchange & Building Co. v. Roanoke G. & W. Co.*, 83.

WATER COURSES.

Milldam owners—Injunction.—Owner of dam in stream of water cannot enjoy prior owner of dam above his from damming back the water for purpose of raising a pond sufficient to supply his mill with water for operating his machinery, although such use at times keeps back the water to the extent of depriving the lower owner of water. *Mumpower v. City of Bristol*, 151.

WATER RATES.

Water companies—Powers—Meters.—The charter of a water company provides that all water rates shall be uniform throughout the city for the same class of service, and designates special charges for hydrants, but also provides that the charge shall not exceed a certain sum per hundred gallons for the amount supplied: *held*, the company may use either the hydrant as a means of charge or any other reliable instrument which will measure the quantity used, and charge some of its customers by the gallon, and at the same time charge others by the hydrant, though it cannot lawfully discriminate between water taxes of the same class. *Exchange & Building Co. v. Roanoke G. & W. Co.*, 83.

WILLS.

1. *General legacies—Interest.*—A general legacy payable in no special manner, where the will is silent as to the time of payment and as to when interest is to begin to run, is not payable until one year after the executor's qualification, and does not bear interest until payable. *Moorman v. Crockett*, 185.
2. *Construction—Advancements.*—Under a will dividing testator's property equally between a son and a daughter, and directing that he, in a settlement with his sister, shall charge himself with a certain bond given him by testator in his lifetime: *held*, such bond will be treated

WILLS—Continued.

- as an advancement to the son, and not as a gift of the entire amount to the daughter. *Idem*.
3. *Powers—Executions*.—Where one to whom a will gives power to appoint to whomsoever he chooses, devises the subject of the power, such devise operates as an execution of the power, unless a contrary intention appears from the will. *Macher v. Funk*, 284.
 4. *Contingency*.—Where a power is authorized to be executed on a contingent event, it may, unless contrary to the intentions of the party creating it, be executed before (though it cannot take effect until) the contingency happens. *Idem*.
 5. *Construction*.—E. devised her property equally to P. and C. and to P. as trustee for H. for life, remainder to her issue, and in default of issue, with power to appoint, and in default of appointment, to P. and C.; and provided that if C. died without issue, her share should go to P. and to P. as trustee for H., with power of appointment in H. H. predeceased P. and C. By her will, which made no allusion to the power or its subject, after some specific legacies, H. gave the residue to J., who conveyed it to P. and C. Afterwards C. died without issue, having devised her estate to N.: *held*, (1) The will of H., though executed in the lifetime of C., was a valid execution of the power. (2) The interest devised by C. to N. in E.'s estate, amounted to one-fourth thereof. *Idem*.
 6. *Powers—Executions*.—Where husband devised his estate to his wife with power to dispose of it by will, *held*, she cannot execute the power by a conveyance during her lifetime, such conveyance being not merely such a defective attempt to execute the power as a court cannot aid and remedy, but in plain disregard of it. *Gaskins v. Finks*, 384.
 7. *Construction*.—Testator by his will says: "I loan to my wife all my estate not heretofore disposed of, during her natural life, and after her death I wish that estate sold and the proceeds equally divided between my four above-named children, or their lawful heirs begotten of their bodies": *held*, (1) The word "loan" is, in this will, used as equivalent to the word "give." (2) The gift to the children vests immediately, so that an assignment by one of them during the widow's life is valid. (3) The word "or" must be read "and," and the word "heirs" taken in its usual and legal sense as a word of limitation. *Chapman v. Chapman*, 409.
 8. *Construction*.—"Son"—*Estates tail*.—The word "son," in its technical sense, is a word of purchase, and must be so construed, unless in the context there is something to the contrary. Nor since the act abolishing entails can a testator be presumed to intend to create an estate tail unless he uses such words as created such estate without implication. *Walker v. Lewis*, 578.

WILLS—Continued.

9. *Estates tail—Shelley's Case.*—A devise of lands to one for life, and after his death to his sons and their heirs forever, to be equally divided among them, but in case of his dying without leaving a son or son's son who can take, then to other designated persons, does not under the rule in *Shelley's Case* create a fee tail in the first devisee, which becomes converted by statute into a fee simple. *Idem.*
10. *Idem—Contingent fees—Perpetuities.*—Two contingent fees by way of remainder may be limited as substitutes or alternatives one for the other, the latter to take effect in case the prior one fails to vest in interest, and is immediately avoided upon the first so vesting, it being limited to vest in interest within a life or lives in being and twenty-one years and ten months thereafter. *Idem.*
11. *Undue influence.*—The fact that the will of a person 88 years old differs from her previously expressed intention, and is made in favor of those standing in a relation of confidence and dependence toward her, raises a presumption of fraud and undue influence, which must be overcome by satisfactory testimony in order that the will may stand. *Whitelaw's ex'or v. Sims*, 588.
12. *Incapacity—Duress.*—Opinions of witnesses long acquainted with testatrix, as to her mental incapacity and incompetency on account of bodily infirmity and duress: *held*, admissible as evidence in a suit to set aside the will, though they be not subscribing witnesses. *Idem.*
13. *Construction—Power to sell.*—Testator bequeaths his estate to his two sisters for their lives, with power to sell if they deem it desirable, but desires them to reinvest or loan the proceeds in some safe manner and avoid consuming the principal; and at the death or marriage of both, any property remaining to go to his adopted son: *held*, the bequest gives the sisters not an absolute fee simple, but only a life estate, with a valid limitation over to the adopted son. *Smythe v. Smythe*, 638.
14. *Restraint of marriage.*—A condition in such a devise to testator's sisters that they are to remain sole, and that in case of either marrying, the property shall thenceforth be enjoyed by the one remaining sole, *held* null and void as placing a restraint upon marriage. *Idem.*
15. *Specific enforcement—Oral agreement.*—An oral agreement between two sisters to make mutual wills cannot be specifically enforced after the death of one of them on the ground of part performance, where there has been no further performance than the making and preserving of the wills and the will of the decedent has been revoked by her marriage after its execution. *Hale v. Hale*, 728.
16. *Contract to make—Statute of fraud.*—One may by a certain and definite contract, bind himself to dispose of his estate by will in a particular way, and such contract in a proper case will be specifically en-

WILLS—Continued.

- forced in equity. But such contract in respect to real estate is within the statute of frauds. The memorandum in writing required by that statute must contain all the essential elements of the contract (except the consideration), without recourse to parol proof. *Idem.*
17. *Case at bar.*—The requirement of § 2840 is not satisfied where (as in the case here) the only memorandum is one of two mutual wills, neither referring to the other or to any other writing. *Idem.*
 18. *Estoppel—Mistake of law.*—The mistaken view of a testatrix that her marriage subsequent to the execution of her will, was not a revocation thereof, does not estop her heirs from claiming that the will was revoked under Code, § 2517. *Idem.*
 19. *Revocation.*—An executor filed his bill to have his testator's will construed, and submitted a writing executed by the latter, to wit: "\$1,000. This article is to signify that if Elliott Smith survive me, I bequeath him one thousand dollars of my property, free from any lien or incumbrance. To the above bequest I herewith set my hand and seal this first day of June, 1888. (Signed) Henry E. Smith. [Seal.]" Afterwards the testator made a will, dated December 2, 1889, disposing of his entire estate, and containing no reference to said writing or to Elliott Smith, which was duly probated: *held*: Said writing was not a contract, but was a will, and was revoked by the subsequent testament. *Swann, ex'or, v. Housman*, 816.
 20. *Contract—Evidence.*—One may contract to make a provision for another by will; but the evidence must be clear and convincing. *Idem.*
 21. *Capacity—Undue influence—Instructions.*—It is error in a suit to set aside a will for testamentary incapacity and undue influence, to refuse an instruction asserting that undue influence is any means employed with the testator, which, under the circumstances, he cannot well resist and which induces him to do what otherwise he would not do. *Chappell v. Trent*, 849.
 22. *Misleading.*—An instruction that the influence to vitiate a will must amount to force and coercion obstructing free agency, and not the mere influence of affection and attachment nor mere desire of gratifying another's wishes, is misleading as being calculated to impress the jury that only physical force or threats of personal violence would be sufficient to vitiate a will, and is erroneous. *Idem.*
 23. *Assumption of facts.*—It is error to give an instruction ignoring the question of testamentary capacity, and thus assuming its existence, and suggesting that unless it be shown that the will was the result of irresistible importunities, or was made purely for the sake of peace, it must be upheld. *Idem.*
 24. *Previous declarations.*—An instruction assuming that the provisions

WILLS—*Continued.*

- of a will accord with testator's affections and previous declarations is erroneous where it devises all of testator's property to persons not related to him, and is contrary to his previous declarations to the effect that he did not intend to make any will, and he is not shown to have had any affection for such beneficiaries. *Idem.*
25. *Burden of proof.*—Beneficiaries, no kin to a testator eighty-five years old, of greatly impaired health and enfeebled mind, and in their custody, and away from his next of kin, and induced by them or his attending physician to devise to them his entire estate, have the burden of clearly proving that the will was his free and voluntary act. *Idem.*
 26. *Evidence of testamentary capacity.*—That a testator had sufficient mind to answer ordinary questions is not evidence of testamentary capacity if he did not have sufficient active memory to collect in his mind, without prompting, particulars of the business to be transacted and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other and to be able to form some rational judgment in relation to them. *Idem.*
 27. *Opinion of subscribing witnesses.*—The mere statement of subscribing witnesses that testator knew what he was doing is not sufficient proof of testator's capacity to entitle the will to be proved, where the proof shows that in fact he did not recognize either of them upon their coming into his room, and that no word passed between them, and that to all appearances testator was unconscious of their presence. *Idem.*
 28. *Opinion of attending physician.*—Testamentary capacity is not established by the opinion of the attending physician alone that testator was mentally competent when he executed the will, where there are numerous facts at and before its execution tending to show the contrary, and such physician's testimony is itself inconsistent, and he states that he is in doubt as to what constitutes mental competency, and would rather state the circumstances, and such circumstances as stated by him indicate lack of a sound disposing mind and memory. *Idem.*
 29. *Testing capacity.*—A will will be set aside as having been obtained by undue influence where, at the time of its execution, the testator was weak, feeble, and nearly unconscious, and it was more the will of his attending physician who drew it, and urged its execution, than of testator, and who wholly omitted his duty of testing testator's mental capacity before taking part in procuring its execution. *Idem.*
 30. *Verdicts.*—A verdict sustaining a will will be set aside where facts and circumstances before and at time of executing the will clearly show want of testamentary capacity, and that the will was not the testator's free and voluntary act, and the verdict can be accounted for

WILLS—Continued.

only on the ground of reliance upon instructions clearly erroneous.
Idem.

31. *Presence of subscribing witnesses.*—The presence of the subscribing witnesses required by the statute is a presence of which testator is conscious, and not that they be merely present together and that testator is looking straight at them, where he does not recognize them, and, instead of his requesting them to attest his will, or their asking him if he desires them to do so, he appears utterly unconscious of their presence. *Idem.*
32. *Signature of testator.*—An instruction that a will is invalid unless in writing and signed by the testator, or by some other person in his presence and by his direction, in such manner as to manifest that the name is intended as a signature, and unless it be wholly written by the testator, the signature must be made or the will acknowledged by him in the presence of at least two competent witnesses present at the same time, and such witnesses must subscribe the will in the testator's presence, is in accordance with the statute and covers the whole ground, and any addition to the effect that such direction need not be in any particular form, but may be given by testator spontaneously or at the suggestion of another, should not be given. *Idem.*
33. *Case at bar.*—In case here after minute consideration of the facts attending the execution of the paper and of the testimony of one of the beneficiaries and of the subscribing witnesses: *held*, there was a failure to prove that testator was at the time possessed of a sound mind and disposing memory, and that therefore said paper was not his true last will and testament. *Idem.*

WITNESS.

1. *Objection to competency.*—Objection to competency of witness: *held*, not necessarily waived unless made before examination-in-chief. *Hill v. Postley*, 200.
2. *Idem.*—Defendant does not become a competent witness in an action on a note given plaintiff for an antecedent debt, wherein the latter is incompetent, because of the fact that the note was given at the instance and in the presence of plaintiff's agent, who has testified in the case, the contract having been made with plaintiff and not with agent. *Idem.*
3. Commonwealth need not call all the witnesses present at the homicide or named in the indictment. But the court, of its own volition, may call such witnesses for cross-examination by both sides, and they will not be considered as witnesses for either. *Clark's Case*, 360.

WITNESS—*Continued.*

4. *Competency*.—Two defendants, against whom no relief was prayed for, and who had been discharged in bankruptcy: *held*, not incompetent to testify, though parties to the suit and to the transactions under review therein. *Moorman v. Arthur*, 455.
5. *Incompetency*.—Where one of the contracting party dies, the opposing party cannot testify, and his incompetency renders the co contractors of the decedent incompetent, and also their assignee, and the heir of any deceased assignee, who is a party to the suit and who is interested in the result. *Ginter v. Breeden*, 565.
6. *Competency*.—At a trial of one of two jointly indicted but electing to be separately tried, the other accused and his wife are competent to testify against the one on trial. *Smith's Case*, 759.
7. *Contract—Evidence*.—One may contract to make a provision for another by will; but the evidence must be clear and convincing. *Swann, ex'or v. Housman*, 816.
8. *Competency*.—The widow of the testator *held* incompetent to prove such contract and to establish the debt against the estate of her late husband. *Idem*.

